Supreme Court, U.S.
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No. 98-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

HERMAN CORN, Trustee

Petitioner,

v.

CITY OF LAUDERDALE LAKES, et al.

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1a. As framed in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992):

> Can the "property interest" for which all economically feasible use must be deprived to effect a compensable taking under the Fifth Amendment be an interest in land which is afforded legal recognition and protection by state law, rather than the land itself?

1b. As framed in *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172, 191 n.12 (1985):

> Does the test of deprivation of all "economic viability" of the land apply to a taking claim based upon a regulatory confiscation of a state law created vested right to develop a specific project?

2. Has a landowner been deprived of all economically viable use of his land over the years during which the landowner successfully established in state court that invalid regulation confiscated the landowner's vested right to develop a specific project, when the landowner did not develop his land for any other use to avoid mooting his state litigation and abandoning his vested rights?

3. Does the rough proportionality analysis of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), rather than the rational basis test, apply to the review of a claim of a city's administrative confiscation of a landowner's constitutionally protected vested right to build a specific project?

PARTIES TO THE PROCEEDING

Plaintiff, Appellant and Petitioner is Herman Corn, Trustee ("Corn").

Defendants and Respondents are the City of Lauderdale Lakes, a Florida municipal corporation (the "City"), Howard Craft ("Mayor"), Alfonso Gereffi, Jerome J. Cohan, Morris Klein, Lyman L. Allen, Louis Greenwald and Harry Kaufman (collectively the "City Councilmen").

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OPINIONS BELOW

This Petition seeks review of the following opinions issued by the United States Court of Appeals for the Eleventh Circuit:

1. *Corn v. City of Lauderdale Lakes,* unpublished *("Corn V")*, included in Petitioner's Exhibit A.

Corn V is a per curium affirmance of Findings of Fact and Conclusions of Law Upon Remand of the United States District Court for the Southern District of Florida ("Third Final Judgment"), included in Petitioner's Appendix A.

2. *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066 (11th Cir. 1996) ("*Corn IV*"), and the Order Denying Rehearing and a Suggestion for Rehearing En Banc, included as Petitioner's Appendix B.

Corn IV affirmed in part, vacated and remanded in part the Findings of Fact and Conclusions of Law Upon Remand of the United States District Court for the Southern District of Florida, ("Second Final Judgment"), included as Petitioner's Appendix C.

3. *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369 (11th Cir. 1993), *cert. denied*, 511 U.S. 1018 (1994) ("*Corn III*"), and the subsequent Order Denying Rehearing and a Suggestion for Rehearing En Banc, included as Petitioner's Appendix D.

Corn III affirmed in part and reversed in part the August 30, 1991 decision of the United States District Court for the Southern District of Florida, published at 771 F.Supp. 1557 (S.D. Fla. 1991) (the "First Final Judgment"), included as Petitioner's Appendix E.

In addition to the opinions identified above, this controversy has generated the following relevant published opinions and unpublished decisions, by state and federal courts:

a. *Corn v. City of Lauderdale Lakes*, 904 F.2d

585 (11th Cir. 1990) ("*Corn II*").

b. *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987) ("*Corn I*").

c. *Corn v. City of Lauderdale Lakes*, 3 F.3d 442 (11th Cir. 1993).

d. *Corn v. City of Lauderdale Lakes*, 415 So.2d 1270 (Fla. 1982).

e. *Corn v. City of Lauderdale Lakes*, 427 So.2d 239 (Fla. 4th DCA 1983) ("*State Corn I*"), included as Petitioner's Appendix G.

f. *Corn v. City of Lauderdale Lakes*, 371 So.2d 1111 (Fla. 4th DCA 1975).

g. *Corn v. City of Lauderdale Lakes*, Case No. 77-12955, Broward County Circuit Court, Final Judgment ("State Court Final Judgment"), included as Petitioner's Appendix H.

h. *Corn v. City of Lauderdale Lakes*, Case No. 69-6229, Broward County Circuit Court, Orders on Summary Judgment, included as Petitioner's Appendix I.

JURISDICTION

This is an action for just compensation for the administrative taking of real property and the vested right to build a specific project without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the Civil Rights Act (42 U.S.C. §1983). The judgments of the Eleventh Circuit were entered as follows:

1. *Corn V* was entered on October 20, 1998.

2. *Corn IV* was entered on September 23, 1996. Corn's Petition for Rehearing and Suggestion for Rehearing

En Banc was denied on March 20, 1997.

3. *Corn III* was entered on August 13, 1993. Corn's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on October 14, 1993.

An extension of time within which to file this Petition for Writ of Certiorari to March 5, 1999, was granted by Justice Kennedy.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"Section 1. . . nor shall any State deprive any person of life, liberty, or property without due process of law. . ."

42 U.S.C. §1983:

"Every person who, under color of any statute, ordinances, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person

> within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . ."

City of Lauderdale Lakes ordinances nos. 103, 104, 105, 548, 549, 552, and 568 are reproduced as Petitioner's Appendix J.

STATEMENT OF THE CASE

A. Introduction

This case presents important regulatory takings issues which have been identified by this Court, and have not, but should be settled by this Court. The Eleventh Circuit has acknowledged that the issues presented through this Petition "reach beyond the fisc of one Florida community and the merits of one case, and involve questions about how decision making is allocated between a democratic institution such as an elected city council and the federal courts". (App. D-7, *Corn III*). The Eleventh Circuit has also acknowledged that the issues presented herein have not been addressed or decided by this Court. (App. B-16, n.5, *Corn IV*).

Through this litigation Corn is seeking just compensation for the City's eight (8) year administrative confiscation of an 8½ acre parcel of property (the "Property"), and his vested right to develop a mini-warehouse/self-storage facility with an attendant strip shopping center (the "Project"), on the Property. The City prevented Corn from developing the Project by wrongfully rejecting Corn's preliminary site plan (the "Site Plan"), after

illegally enacting ordinances rezoning and placing a moratorium on development of the Property and eliminating warehouses as an authorized use of land in the City. Before seeking just compensation in federal court Corn successfully sued the City in state court, and established that the offending ordinances were improperly enacted and that the City was estopped from enforcing the ordinances against the Property because Corn had a vested right to develop the Project. The state court found that the City lacked discretion and was required to approve the Site Plan and issue a building permit for the Project.

The state court litigation lasted almost eight years. Throughout this time the invalidated ordinances and wrongful rejection of the Site Plan remained in effect, preventing Corn from developing the Project, thereby depriving him of all economically viable use of both his vested right to develop the Project and the Property.

Through the federal litigation Corn has unsuccessfully sought the recovery of just compensation for the confiscation of his constitutionally protected property interest in the Project and the taking of his Property.

B. Pre-Litigation Background

The Property was part of a 261 acre tract (the "Tract"), acquired by Corn in 1966, when the Tract was not within the boundaries of any city, and was zoned for agricultural use. (App. H-2, State Court Final Judgment[1];

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[1]The parties were collaterally estopped from relitigating the facts conclusively established in the State Court Final Judgment. *Allen v. McCurry*, 449 U.S. 90, 96 (1980).

App. E-1, First Final Judgment). Corn and the City reached as agreement pursuant to which the Tract was annexed into the City[2], in consideration for which the City approved Corn's development plan for the Tract. (App. B-2, *Corn IV*). Pursuant to this agreement, ordinances were simultaneously enacted annexing the Tract into the City (Ordinance 104), zoning the property comprising the Tract for residential, commercial and industrial use, in accordance with Corn's development plan (Ordinance 105), and creating zoning category C-1A, an industrial zone which allowed warehouses, to apply to the Property (Ordinance 103). (App. E-2, First Final Judgment; App. B-2, *Corn IV*).

Soon thereafter, Corn expended in excess of $100,000 in reliance upon the City's annexation and zoning of the Property, developing the Property for C-1A use. (App. G-3, State Court Final Judgment; App. E-2, First Final Judgment). The Property fronted on a main thoroughfare on the east and was bounded by a canal on the south. (App. E-2, First Final Judgment). After the annexation and rezoning, Corn constructed canals on the western and northern borders of the Property to create a buffer between the Property and the proposed residential areas; as a result the Property became an "island", 370 feet wide and 1,030 feet deep, surrounded by water on three sides and by the main thoroughfare on the fourth side (*Id.*).

Corn thereafter proceeded to develop the Tract in accordance with his original development plans and the zoning established by Ordinance 105, first building single

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[2]Without Corn's consent the City would have had to hold a formal referendum or secure an act of the Florida legislature to annex the Tract. Fla.Stat., Ch. 171, et seq.

family homes and condominiums. (App. H-2, State Court Final Judgment; App. E-2, First Final Judgment; App. B-2, *Corn IV*). In 1969 the City attempted to change the zoning of a portion of the Tract. (App. H-2-3, State Court Final Judgment). Litigation ensued resulting in a judgment holding that the City was estopped from changing the zoning. (App. G-2, *State Corn I*). The ruling of estoppel to change zoning was applicable to the entire Tract. (App. I-2, Order Granting Summary Judgment).

On April 1, 1977, Corn submitted the Site Plan to the City. (App. E-23, First Final Judgment). The Site Plan depicted the construction of the Project, including an approximate 103,000 square foot mini-warehouse situated in the rear of the Property, and an approximate 67,000 square foot shopping center across the front of the Property, between the main road and the mini-warehouse facility. (*Id.*)

The Site Plan was approved by the City's Planning and Zoning Board on two separate occasions. (App. H-9, State Court Final Judgment; App. E-3, First Final Judgment). The City Council tabled consideration of the Site Plan on three occasions, at which meetings residents living adjacent to the Property actively opposed the Project. (App. H-9-10, State Court Final Judgment). While residents raised "concerns" regarding the Project, no resident or member of the City presented any evidence supporting any of the expressed concerns. (App. E-3, 21, First Final Judgment). Indeed, each of the concerns had been considered by the City's Planning and Zoning Board, which determined that the Site Plan complied with all of the City's regulations and ordinances regarding such matters. (App. H-7-9, State Court Final Judgment).

Ultimately, on July 12, 1977, the City acceded to the residents' vocal opposition to the Project. (App. G-4, *State Corn I*; App. E-22, First Final Judgment; App. D-2, *Corn III*). Without having conducted any investigation of mini-warehouses or study of whether there was any reason to rezone the Property, (App. E-4, 21, First Final Judgment), the City enacted Ordinance 549, which rezoned the Property from C-1A to B-3, a more restrictive category which did not permit warehouses, and Ordinance 548, which eliminated only storage warehouses as a permitted use in the C-1A zone. (App. E-3, First Final Judgment). This was the first time the City had considered rezoning the Property or changing the uses permitted within the C-1A zoning category. (*Id.*). The City did not afford Corn or anyone notice of its intention to enact these Ordinances. (App. G-4, *State Corn I*).

After enacting the Ordinances and based thereon, the City Council denied approval of the Site Plan. (App. H-12, State Court Final Judgment; App. E-3, First Final Judgment).

The City soon thereafter enacted Ordinance 552, which imposed a 150 day building moratorium, prohibiting the issuance of building permits for the two parcels of C-1 property in the City, one of which was the Property. (App. H-11, State Court Final Judgment; App. E-3, First Final Judgment). The moratorium was ostensibly enacted to evaluate the impact of C-1 zone uses on adjacent residential property. (App. J-22-25, Ordinance 552). The Planning and Zoning Board's report was not submitted until December, 1977, months after the Property had already been rezoned B-3. (App. D-35, *Corn III*). The moratorium was extended by Ordinance 568, until July 4, 1978. (App. J-26, 27, Ordinance 568; App. E-4, First Final Judgment). (Ordinances 548, 549, 552, and 568 shall collectively be

referred to as the "Ordinances").

The City's "purposeful action" prevented Corn from developing the Project. (App. D-13, *Corn III*).

C. The State Court Litigation - Corn Has Vested Rights in the Project and the City Must Approve the Site Plan and Issue a Building Permit.

Corn sued the City in state court, challenging the validity of the Ordinances and seeking to compel the City to approve the Site Plan. (App. E-4, First Final Judgment).[3] On October 20, 1978, the State Court Final Judgment was entered, ruling in favor of Corn. (App. H, State Court Final Judgment).

The trial court found that because Corn had both expended money and made substantial physical changes in the land in reliance upon the City's adoption of the original zoning ordinance, it was grossly unfair to permit the City to change the zoning of the Property. (App. H-14-15, State Court Final Judgment; App. G-5, *State Corn I*). The City's annexation and zoning of the Property and Corn's reliance thereon in preparing the Property for development conferred upon Corn vested rights in the zoning of the Property, and in the Project. (App. H-17, State Court Final Judgment; App. D-3, *Corn III*). As a result, the City was estopped from rezoning the Property and from denying approval of the Site Plan. (*Id.*) Further, the Ordinances were declared invalid for the City's failure to follow its own notice and procedural

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[3]At the time Corn instituted the state court litigation Florida law did not afford a landowner the entitlement to recover money damages for the unconstitutional taking of property. *Corn I* at 1517.

requirements for their passage. (*Id.*) The court found that the City had no discretion and was obligated to approve the Site Plan and issue a building permit for the Project upon Corn's correction of three technical deficiencies which the City had never afforded Corn the opportunity to correct. (App. H-12, State Court Final Judgment; App. G-5, *State Corn I*).

The City appealed the State Court Final Judgment. (App. G, *State Corn I*). The City's appeal served to stay enforcement of the State Court Final Judgment, so that the Ordinances and denial of the Site Plan remained in effect during the pendency of the appeal. (App. E-5, First Final Judgment). The State Court Final Judgment was affirmed. (App. G, *State Corn I*). The Florida appellate court issued its mandate on March 4, 1983, at which time the decision became final. (App. E-5, First Final Judgment).

Thereafter, Corn submitted a revised Site Plan to the City for approval, which the City refused to approve unless Corn complied with platting requirements which were adopted after July, 1977, when the City should have approved the Site Plan. (App. E-5, First Final Judgment). On March 26, 1985, the state court ordered the City to issue Corn a building permit without platting. (App. E-6, First Final Judgment). (The state court proceedings between 1977 and March, 1985, shall be collectively referred to as the "State Court Litigation").

Throughout the pendency of the State Court Litigation Corn did not develop the Property. For the first year, a moratorium prohibited all development. Thereafter, Corn was wrongfully prohibited from building the Project. Corn would have had to accede to the City's illegal action and abandon his vested right to build his Project to develop the

Property for any other use. Further, any alternate use would have been restricted by the illegal rezoning of the Property to a business use, instead of the originally authorized industrial use. By the time the state court reaffirmed Corn's vested right to develop the Project, changes in the area and the growth of competition in the intervening eight years had rendered development of the Project economically unfeasible.

Corn has unsuccessfully attempted to sell the Property since 1985. The Property is still owned by Corn, which, because of its unique configuration, cannot be developed for any economically viable use.

D. Federal Court Litigation

On January 17, 1984, Corn filed the underlying action, seeking damages for violation of the just compensation, due process and equal protection clauses of the Fifth and Fourteenth Amendments and the Civil Rights Act. (App. D-5,6, First Final Judgment). The jurisdiction of the district court was invoked under 28 U.S.C. §§1331 and 1343. The action was dismissed as unripe under *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). (App. E-7, First Final Judgment). The Eleventh Circuit reversed. (*Corn I*). The Eleventh Circuit later confirmed that Corn's claims were not barred by the statute of limitations or res judicata. (*Corn II*).

On August 30, 1991, following a four day non-jury trial, the district court issued the First Final Judgment, ruling in favor of Corn on his "substantive due process takings

claim".[4] (App. E, First Final Judgment). The district court concluded that the City Council's enactment of the Ordinances and rejection of the Site Plan was motivated solely by an irrational desire to thwart Corn's Project.

Specifically, the district court made the following findings:

1. Corn had a vested right to build the Project. (App. E-15, First Final Judgment).

2. Corn's vested right in the Project was a constitutionally protected property interest created by Florida law. (App. E-20, First Final Judgment).

3. The City acted arbitrarily and capriciously in denying approval of the Project by failing to independently evaluate the merits of the Project, and instead, blindly following the will of the residents, thereby depriving Corn of a constitutionally protected property interest. (App. E-21, 22, First Final Judgment).

The district court awarded damages as just compensation to Corn. (App. E-32, First Final Judgment).

Corn appealed the First Final Judgment, claiming that the compensation awarded by the district court was not just. (App. D-5, *Corn III*). The City cross-appealed. (*Id.*). The Eleventh Circuit reversed the First Final Judgment, determining that certain findings of fact of the district court were clearly erroneous. (App. D-38, 39, *Corn III*), and,

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[4]Through his substantive due process takings claim Corn maintained that the City's wrongful enactment of the Ordinances and rejection of the Site Plan was arbitrary and capricious, failing to substantially advance a legitimate state interest. (App. E-14, First Final Judgment).

employing a rational basis test, the City did not act arbitrarily and capriciously. (App. D-44, *Corn III*).

The Eleventh Circuit remanded the case to the district court for a consideration of Corn's just compensation claim,[5] which had not been ruled upon. (App. D-56, *Corn III*).

On remand, the district court issued the Second Final Judgment, ruling in favor of the City and against Corn on Corn's just compensation claim (App. C, Second Final Judgment). Corn appealed the Second Final Judgment to the Eleventh Circuit, which affirmed the judgment in part and remanded the cause to the district court solely for a determination of whether Corn was deprived of all use of the Property during the moratorium. (App. B-21, *Corn IV*). In so ruling the Eleventh Circuit concluded as follows:

1. While the City confiscated Corn's vested right to build the Project from 1977 through 1985, he was not deprived of all uses of the Property. During the pendency of the State Court Litigation Corn could have and was obligated to develop the Property for some alternative use. (App. B-13, 14, *Corn IV*).

2. While a party who has a vested right to build a particular project has a constitutionally protected property right under the due process clause of the Fifth Amendment, such vested right does not qualify as property under the takings clause of the Fifth Amendment, so that just compensation is not due for the taking of the vested right.

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[5]Through Corn's just compensation claim Corn maintained that the City's wrongful rejection of the Site Plan deprived him of all economically viable use of the Property and of his constitutionally protected property interest in the Project. (App. B-6-7, *Corn IV*).

(App. B-19, *Corn IV*).

3. The confiscation of a vested right to develop a particular project only gives rise to a claim for just compensation for the taking of the project if the government action in issue fails to advance a legitimate state interest. (App. B-21, *Corn IV*).

On remand from *Corn IV*, the district court concluded that the moratorium did not apply to the Property because the moratorium applied to C-1 property, and soon after enactment of the moratorium ordinance the Property was rezoned from C-1A to B-3. (App. A-10, Third Final Judgment). The Eleventh Circuit affirmed the Third Final Judgment (App. A-1, *Corn V*).

Through this Petition Corn seeks review of certain legal issues determined in *Corn III* and *Corn IV*.[6]

REASONS WHY THE WRIT SHOULD ISSUE

A. This Case Affords This Court With the Opportunity to Resolve the Uncertainty Regarding Whether, and Which, Property Interests in Land Are Constitutionally Protected From Taking Without Just Compensation.

1. This Court Has Afforded Constitutional Protection to Specific Property Interests in Land.

It is well settled that a landowner who is deprived of

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[6]This Court can consider questions raised in earlier appeals in a case in which there have been multiple appeals. *Mercer v. Theriot*, 377 U.S. 152, 153 (1964).

all economically viable use of his land through regulation has suffered a taking for which compensation is due pursuant to the Fifth Amendment. *E.g. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992). This Court has also held that the regulatory taking of specific or particular property interests in land are compensable under the Fifth Amendment. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 522 (1998) (Kennedy concurring in the judgment and dissenting in part). This Court has identified the following specific property interests as protected by the Constitution so that compensation for their taking is due:

1) right to exclude others from one's land. *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987).

2) right to mine underground coal. *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 413 (1922).

3) invasion of landowner's airspace. *United States v. Causby*, 328 U.S. 256, 262 (1946).

4) tenant's leasehold interest in land. *United States v. General Motors* Corp., 323 U.S. 359, 378 (1945).

5) real estate lien to secure a mortgage on land. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602 (1935).

6) right to devise a fractional interest in land. *Babbit v. Youpee*, 519 U.S. 234, 239 (1997); *Hodel v. Irving*, 481 U.S. 704, 715-16 (1986).

These cases are applications of well settled law that property interests protected by the Fifth Amendment's taking clause are not created by the Constitution, and instead, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. *E.g. Lucas*, 505 U.S. at 1016, n.7; *Ruckelshaus*

v. Monsanto Company, 467 U.S. 986, 1001 (1984).[7] In each of the cases listed above, the party holding the specific interest in the land in issue, (i.e., the owner, tenant, mortgages), had an expectation created by state law or some other source that their particular property interest, (i.e., airspace, right to mine coal, lessee's interest), would not be interfered with or taken, thereby conferring constitutional protection upon each such property interest. This Court held in each case that just compensation was due for the taking of the specific property interest even though each taking did not destroy all economic use of the land. The taking of the constitutionally protected property interest was sufficient to trigger the obligation to pay just compensation.

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[7]In *Corn IV*, the Eleventh Circuit erroneously stated that "property" as used in the just compensation clause of the Fifth Amendment is defined much more narrowly than in the Fifth and Fourteenth Amendments due process clauses, so that while certain property interests may not be taken without due process, they may be taken without paying just compensation. (App. B-18, 19, Corn IV). The Eleventh Circuit is clearly wrong.

This Court has employed the identical standard of looking to existing rules or understandings that stem from an independent source such as state law to determine whether a party has a property interest for both takings cases, *e.g. Lucas*, 505 U.S. at 1030; Ruckelshaus, 467 U.S. at 1001-04, and due process cases *E.g. Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Since resort is made to the same legal standard, an interest is either a property interest for both the takings clause and due process clause, or it is not a protected property interest for either clause. *See Texaco v. Short*, 454 U.S. 516, 525 (1982) (evaluation of whether Indiana state law created property interest in mineral rights for both claims of violation of due process and taking of property).

2. This Court Has Acknowledged That Uncertainty Exists and Must be Resolved Regarding the Identification of the Specific Property Interests in Land Which Are Constitutionally Protected From Being Taken Without Just Compensation.

Each of the cases listed in Section (A)(1), above were decided in a manner which does not lend to application beyond the subject case. Indeed, there has never been any analysis of, or decision explaining the nature of the property interest for which all use must be deprived for a compensable taking to occur. In *Lucas, supra,* this Court acknowledged the need for clarification of the identification of the property interests subject to compensable taking, explaining:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured.***Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court.***The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property-i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. (emphasis added). *Id.*

at 1016, n.7.

This "uncertainty regarding the composition of the denominator [of the] deprivation fraction" shall be resolved through the granting of this Petition. This case affords the Court the opportunity to confirm that the "denominator in the deprivation fraction" can be any specific interest in land which is afforded constitutional protection, so that the deprivation of all use of this particular interest is a compensable taking, irrespective of whether economically feasible uses of the land in issue remain.

Lucas was not the first case in which this Court identified, without deciding, the issue presented by this case. In *Williamson County, supra*, the landowner claimed to have suffered a taking of his vested rights to develop a particular project according to plans that had been submitted for approval. This Court concluded that the landowner's case was not ripe because no final decision had been reached by the government entity charged with implementing the regulations regarding the application of the regulations to the property in issue. *Williamson County*, 473 U.S. at 190-91. In explaining the need for such a final decision this Court stated:

> The District Court's instructions allowed the jury to find a taking if it ascertained "that the regulations in question as applied to [respondent's] property denied [respondent] economically viable use of its property" Tr. 2016. That instruction seems to assume that respondent's taking theory was simply that its property was rendered valueless by the application of new zoning laws and subdivision

> regulations in 1980. The record indicates, however, that respondent's claim was based upon a state law theory of "vested rights," and that the alleged "taking" was the Commission's interference with respondent's expectation interest in completing the Development according to its original plans... We express no view of the propriety of applying the "economic viability" test when the taking claim is based upon such a theory of "vested rights" or "expectation interest." (citation omitted). It is sufficient for our purposes to note that whether the property taken is viewed as the land itself or respondent's expectation interest in developing the land as it wished, it is impossible to determine the extent of the loss or interference until the Commission has decided whether it will grant a variance from the application of the regulations. (emphasis added). *Id.* at 191 n.12.

This Court thus acknowledged, without deciding, that a landowner's vested right to develop a particular project may be a constitutionally protected property interest, the taking of which is compensable, even if there are other economically viable uses of the land in issue.

This case presents a ripe opportunity for this Court to resolve the issue which was identified and left unanswered in both *Williamson County* and *Lucas*. It is undisputed that Corn was wrongfully deprived of all use of his vested right to build the Project for years. (App. B-19, *Corn IV*). The only issue to be resolved is whether Corn's vested right to build the Project is a constitutionally protected property interest

deserving of protection by the Takings Clause, so that its confiscation by the City requires the payment of just compensation.

3. Corn's Vested Rights Are a Constitutionally Protected Property Interest Pursuant to Florida Law.

Contrary to the holding of *Corn IV* (App. B-19, *Corn IV*), it is appropriate to refer to state law to determine whether a particular property interest is afforded constitutional protection pursuant to the Takings Clause. In *Ruckelshaus, supra,* this Court looked to state law to determine whether intangible property such as trade secrets were afforded sufficient protection to be considered "property" under the Takings Clause. *Id.* at 1001-04. This Court concluded that state law indeed treated intangible property in a manner that rendered trade secrets deserving of Takings Clause protection. *Id.* at 1003. Employing this same analysis and referring to Florida state law unequivocally establishes that Corn's vested right to build the Project is a property interest protected by the Fifth Amendment takings clause.

It was conclusively established through the State Court Litigation that Corn had a vested right to build the Project so that the City was estopped from rezoning the Property and was compelled to approve the Site Plan and issue a building permit. (App. H, State Court Final Judgment; App. G-9, *State Corn I*; App. D-3, *Corn III*). The district court also found that Corn had such vested rights. (App. E-15, First Final Judgment).

Corn's vested right to build the Project was thus a constitutionally protected property interest protected by the

Fifth Amendment's takings clause created by Florida law. *See Lucas*, 505 U.S. at 1016, n.7; *Ruckelshaus*, 467 U.S. at 1001.

A vested right under Florida law is a property right which is created as a matter of fairness to protect the property owner from the loss of an interest in property which he has enjoyed. *Hollywood Beach Hotel v. City of Hollywood*, 329 So.2d 10, 15-16 (Fla. 1976). A city is equitably estopped from depriving a property owner of a particular property right as a result of conduct of the city upon which the landowner has relied to his detriment. *Id.; Sakolsky v. City of Coral Gables*, 151 So.2d 433, 436 (Fla. 1963). The city is estopped from exercising its police power to prohibit a particular use of land when the landowner's change of position in reliance on the city's actions would render it inequitable and unjust to destroy the right to use the land the landowner has acquired. *Hernando County Board of Commissioners v. S.A. Williams Corporation*, 630 So.2d 1155, 1156 (Fla. 5th DCA 1993). Under such circumstances the landowner's right to develop the property for a particular use becomes vested, and is not subject to revocation. *Hollywood Beach Hotel*, 329 So.2d at 16.

Vested rights are based upon the recognition that a landowner's reliance upon a city's conduct creates an expectancy or an entitlement to certain rights which it would be inequitable to allow a city to revoke. *Town of Largo v. Imperial Homes Corporation*, 309 So.2d 571, 573 (Fla. 2d DCA 1975). Vested rights thus protect a landowner against even otherwise valid zoning ordinances because, as a matter of fairness, a city cannot deprive a landowner of a property interest created under such equitable circumstances. *Id.*

Florida courts have recognized that a property owner

can have a vested right in a particular zoning classification, which prohibits a city from rezoning property. *Hollywood Beach Hotel*, 329 So.2d at 16; *Town of Largo*, 309 So.2d at 574. Florida courts have also recognized that a property owner can have a vested right in a building permit, or to the issuance thereof, thereby estopping the city from withdrawing or refusing to issue a permit. *Hollywood Beach Hotel*, 329 So.2d at 16; *The Florida Companies v. Orange County*, 411 So.2d 1008, 1011 (5th Cir. DCA 1982); *Town of Largo*, 309 So.2d at 573.

The Eleventh Circuit has confirmed that as a matter of constitutional law Florida law creates a constitutionally protected property interest in the vested right in a particular project or a building permit. *Reserve Ltd. v. Town of Long Boat Key*, 17 F.3d 1374, 1380 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 729 (1995) (Florida law creates constitutionally protected property interest in a building permit); *Spence v. Zimmerman*, 873 F.2d 256, 257-58 (11th Cir. 1989) (constitutionally protected property interest in a permit or certificate of occupancy if the city lacks discretion and must issue the permit or certificate); *AA Profiles v. City of Fort Lauderdale*, 850 F.2d 1483, 1488 (11th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989), (property interest in woodchipping development); *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347, 1351 (11th Cir. 1990) (property interest in apartment project).

Having accorded vested rights such legal recognition and protection, Florida law has conferred the status of constitutionally protected property interests upon vested rights. *See Ruckelshaus*, 467 U.S. at 1001-04.

4. Recognizing Vested Rights as Constitutionally Protected Property Interests is Consistent with Supreme Court Takings Jurisprudence.

Recognizing that a vested property right is a constitutionally protected property interest for which compensation is due under the Fifth Amendment for its wrongful taking is consistent with takings jurisprudence.[8]

In this regard, a factor "of particular significance" which is evaluated in determining whether a taking has occurred is the government's "interference with reasonable investment backed expectations". *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Vested rights are based upon the notion of the fairness of protecting and preserving a landowner's reasonable investment backed expectations created as a result of his detrimental reliance on governmental action. *See Hollywood Beach Hotel*, 329 So.2d at 15-16. Accordingly, by definition, one always has reasonable investment backed expectations in a vested property right. *See Town of Largo*, 309 So.2d at 573. Vested rights are thus appropriate property interests to be recognized as having been afforded constitutional protection

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[8]Scholars have recognized that vested rights have a constitutional base, conferring constitutional protection on property rights a landowner has acquired in the use of his land. D. Mandelker, *Land Use Law*, The Zoning Process §6.12, at 214 (1988). Vested rights have been recognized as a "super property right", being immune from exercise of the police power, and as such possessing more constitutional propriety weight than a mere property right. Hanes and Minchew, On Vested Rights To Land Use and Development, 46 *Washington Law Review* 373, 376 (1989). The exercise of regulatory police power that causes the diminishment of a vested right is one that goes "too far"." *Id.*

pursuant to Florida law.[9]

Vested rights and other specific interests in land which are protected by state law must be afforded constitutional protection from taking without just compensation. The protection intended to be afforded such property interests is emasculated if the only sanction for a city's confiscation of such property interests is that invalidation of the offending regulation, without any obligation to pay just compensation for the temporary taking of the property interest. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304, 317-18 (1987). Cities shall be free to delay enjoyment of, or confiscate property interests so long as the offending regulation does not deprive the landowner of all use of his land. Landowners shall solely bear the economic injury caused by the city's wrongful conduct. These injustices can only be remedied by requiring the payment of just compensation for the taking of property interests in land afforded constitutional protection by state law or other independent sources.

B. The Regulatory Confiscation of a Constitutionally Protected Property Interest in a Project Throughout the Pendency of State Court Litigation Which Invalidates the Regulation Effects a Taking of the Land.

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[9]This Court has protected vested rights from interference or confiscation by retroactive legislation. *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994). Indeed, in *Landgraf* this Court explained that the anti-retroactivity principle finds expression in several provisions of the Constitution, including the Fifth Amendment, which prevents government "from depriving private persons of vested rights except for a "public use" and upon payment of "just compensation"." (emphasis added). *Id.*

Another important, unresolved takings issue presented by this case is under what circumstances does a city's wrongful refusal to allow a landowner to develop land for a specific use for a period of time constitute an unconstitutional taking of the land for which just compensation is due. When must just compensation be paid to a landowner who is forced to engage in successful, lengthy litigation with a city to establish his right to develop his land for a specific use, for the delay in the commencement of the development of the property throughout the pendency of the litigation? Is it appropriate for the economic burden of the inability to develop land for a specific use for which the landowner has vested rights, during the pendency of the litigation to be shifted to the public, who has derived the "benefit" of the land remaining vacant as a result of the city's improper conduct? *See San Diego Gas and Electric Company v. City of San Diego*, 450 U.S. 621, 656 (1981) (it is only fair for public to bear the cost of benefits received between application of offending regulation and its rescission).

Corn was indeed deprived of all economically viable use of the Property from July, 1977, through March 26, 1985. Corn acknowledges that between July, 1978, and March, 1985 there were alternative, albeit less economically viable uses for which the Property "could" have been developed.[10] Nonetheless, Corn was not obligated to succumb to the City's illegal conduct, waive his constitutional rights,

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[10]Between June, 1977 and July, 1978, Corn was prevented from developing the Property for any use pursuant to the moratorium ordinances. By March, 1985, due to changes in demographics and overbuilding in the area, there was no economically feasible use to which the Property could be put, so that the temporary taking matured into a permanent taking.

and moot the State Court Litigation by developing the Property for an alternative use. The City's confiscation of the Project thus caused Corn to suffer a deprivation of all use of the Property during the pendency of the State Court Litigation.

Corn had a constitutionally protected vested right to build the Project, with which right the City could not lawfully interfere. While Corn successfully established in the State Court Litigation that he was wrongfully prevented by the City from building the Project he was not legally obligated to develop the Property for any alternative use. As a practical matter, if Corn had developed the Property for an alternate use, he would not have been able, thereafter, to build the Project. As a legal matter, development of an alternate use would have rendered moot the litigation regarding the City's duty to approve the Site Plan. *See Glisson v. Alachua County*, 558 So.2d 1030, 1037 (Fla. 1st DCA 1990) (issue of whether land use regulation effected taking of property rendered moot when regulation amended); *Central and Southern Florida Flood Control District v. Duquis*, 162 So.2d 289, 291 (Fla. 3d DCA 1964). Corn could not put the Property to any use during the pendency of the State Court Litigation without abandoning his vested right to build the Project, and his constitutional right to be compensated for the City's confiscation of the Project. Corn's takings claim could never ripen without a resolution of the State Court Litigation. *Williamson County*, 473 U.S. at 194-95. The well settled doctrine of "unconstitutional conditions" prevents the City from forcing Corn to choose between developing the Property for an alternate use and Corn's right to develop the Project or to receive just compensation for the City's confiscation of the Project. *See Dolan*, 512 U.S. at 2317.

Since Corn could not be lawfully compelled to develop the Property for an alternate use during the pendency of the State Court Litigation, the wrongful taking of Corn's vested right to build the Project deprived Corn of all use of his Property during the pendency of the State Court Litigation. Accordingly, Corn is entitled to just compensation for the taking of his Property.

Denying Corn just compensation because he could have developed the Property for an alternate use during the pendency of the State Court Litigation only serves to allow the City to accomplish that to which it did not have any legal or constitutional right--to prevent Corn from developing the Project without compensating him for confiscating his vested right to do so.

C. The *Dolan* Stricter Standard of Rough Proportionality, Rather Than the Rational Basis Test, Applies to a Claim of an Administrative Confiscation of a Constitutionally Protected Property Interest.

This Court has held that a landowner is entitled to just compensation for the taking of his land even if alternative viable uses of the land remain, providing the City's conduct was arbitrary and capricious, failing to advance a legitimate state interest. *See Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). Less clear is the standard of review to be applied to a taking claim that the regulation in issue failed to advance a legitimate state interest. What is the required degree of connection between the regulation and the state interest sought to be achieved?

This Court answered this question, in part, in *Dolan*,

supra, holding that when a city makes an adjudicative decision which exacts a constitutionally protected property interest in land, the burden properly rests on the city to prove that its actions substantially advance a legitimate state interest. *Dolan*, 512 U.S. at 391 n.8. There must be a "rough proportionality" between a city's actions and the stated public purpose. *Id.* at 391. Rough proportionality requires a reasonable relationship, a standard more strict than the rational basis level of scrutiny under the equal protection clause of the Fourteenth Amendment. *Id.* While no precise mathematical calculation is required, a city must make some effort to quantify its findings in support of its actions, and cannot simply believe that its actions will accomplish the desired result, to substantially advance a legitimate state interest. *Id.* at 395, 396.

In *Dolan*, the property interest exacted was the landowner's right to exclude others from their property. *Id.* at 384. The right to exclude others from property is a property interest which is afforded constitutional protection. *See Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987). Accordingly, in *Dolan*, regulation which impacted a constitutionally protected property interest was held to the higher level of scrutiny of the rough proportionality standard than the rational basis test.

Applying a stricter level of scrutiny to a claim of an exaction of a constitutionally protected property interest as compared to a right which is not constitutionally protected is consistent with this Court's application of differing levels of scrutiny depending upon the nature of the right in issue. *E.g. Reno v. Flowers*, 507 U.S. 303, 303-06 (1993) (standard of review in substantive due process claim more stringent when fundamental rights involved than when right is not

fundamental); *Clark v. Jeter*, 486 U.S. 456 (1988) (rational basis, intermediate scrutiny or strict scrutiny given legislation violative of equal protection clause depending on right involved). The right to be compensated for the taking of property is a fundamental right, *Lynch v. Household Finance Corporation*, 405 U.S. 538, 552 (1972), so that the taking of constitutionally protected property interests must be analyzed employing a higher level of scrutiny than the rational basis test. *Dolan* mandates this result.

The *Dolan* rough proportionality standard should be applicable to all adjudicative decisions which confiscate a constitutionally protected property interest in land. The method by which the protected interest in land is confiscated is irrelevant. It is the impact of the adjudicative act, and not the process by which this impact is achieved that is significant. A city's deprivation of the right to exclude others from land deprives the landowner of the same "essential stick in the bundle of rights commonly characterized as property" regardless of whether this right is exacted as a condition of the issuance of a permit or through the required uncompensated conveyance of an easement. *Nollan*, 483 U.S. at 834. A city must be held to the rough proportionality standard rather than the rational basis test whenever its regulation serves to confiscate a constitutionally protected property interest in land.

The *Dolan* rough proportionality standard is applicable to this case. The City confiscated Corn's constitutionally protected property interest in his vested right to build the Project. Indeed, the City conditioned Corn's right to develop the Property on his forfeiture of his vested right to develop the Project, thereby exacting a constitutionally protected property interest from Corn. Further, this exaction was

effected by an administrative act--the rejection of the Site Plan--and not a legislative act. (App. G-10, *State Corn I* App. D-53-55, *Corn III*). Accordingly, since the confiscation of a constitutionally protected property interest was involved, under *Dolan* it was the City's burden to establish that the rejection of the Site Plan bore a reasonable relationship or rough proportionality to the general health and welfare concerns the City allegedly sought to achieve.

CONCLUSION

Regulatory taking cases are among the most litigated and perplexing in current law. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978). This case provides this Court with the opportunity to answer questions raised and left unanswered in *Lucas* and *Williamson County*, and other unresolved issues regarding taking claims, thereby providing needed guidance to federal courts and state courts. The issues presented are both significant and commonplace. All governmental entities and landowners shall benefit from this Court's resolution of the legal issues presented herein.

Corn respectfully requests this Court to grant Certiorari to consider the issues presented herein.

DATED: March 5, 1999

Respectfully submitted,
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HERMAN CORN, Trustee

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5336

D.C. Docket No. 84-6034-CV-JCP

HERMAN CORN,

Plaintiff-Appellant,

v.

CITY OF FORT LAUDERDALE LAKES,

Defendant-Appellee.

[stamp-Filed U.S. Court of Appeals Eleventh Circuit,
October 20, 1998, Thomas K. Kahn, Clerk]

Appeal from the United States District Court
for the Southern District of Florida

(October 20, 1998)

Before TJOFLAT and EDMONDSON, Circuit Judges,
and KRAVITCH, Senior Circuit Judge.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-.1.[1]

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[1] 11th Cir. R. 36.1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on finding of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-6034-CIV-PAINE

HERMAN CORN, Trustee

Plaintiff,

v.

CITY OF LAUDERDALE LAKES,
a Florida municipal corporation; HOWARD CRAFT;
ALFONSO GEREFFI; JEROME J COHAN;
MORRIS KLEIN; LYMAN L. ALLEN;
LOUIS GREENWALD; and HARRY KAUFMAN,

Defendant.

[stamp-Filed April 25, 1997, Carlos Juenke Clerk,
U.S. Dist. Ct. S.D. of Fla. • W.P.B.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON REMAND

This matter is before the court upon remand from the Eleventh Circuit as set forth in *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066 (11th Cir. 1996) upon the very narrow issue of whether that City's moratorium effected a temporary taking of Corn's Parcel of property. The Court of Appeals vacated the judgment that was entered upon this court's finding that the moratorium did not effect a temporary taking of Corn's property because this court did not explain the specific factual basis for this conclusion. The appellate court affirmed this court's prior findings of fact and conclusions of law in all other respects.

The court agrees with the parties contentions in the appellate court that no further evidence need be taken in this narrow issue. Accordingly, the court enters the following additional findings of fact on the very narrow issue of whether Corn was deprived all economical viable use of his property during the Moratorium period, and conclusions of law on the very narrow issue of whether Corn suffered a temporary taking of his property as a result thereof. Because the facts of this case are set forth in detail in prior orders of this court and also in at least three published opinions, the court will not restate facts regarding any other issue save for the temporary taking/ecomonically [sic] viable use issue.

FINDINGS OF FACT

1. During 1975, the CITY retained the services of a land use planner, who questioned the propriety of C-1A zoning for the Subject Property (i.e. Corn's parcel property). No formal action, however, was taken with respect to changing the zoning classification of the Subject Property until July 12, 1977.

2. On July 12, 1977, the City Council discussed changes in both the uses permitted within C-1A property and the zoning classification of CORN's property. The City Council in fact passed two ordinances on first reading that were ultimately adopted:

a. Ordinance 548 amended Article XXXVII, Section 37.2 of the Broward County Zoning Classification Restrictions and Regulations, as adopted by reference, to eliminate storage warehouses as a permitted use in category C-1, the preexisting category at the time of annexation, and consequently, category C-1A, the category created for the Subject Property after annexation; and

b. Ordinance 549 rezoned Corn's Property from C-1A (commercial) to B-3 (business), a more restrictive category.

3. Accordingly, as of July 12, 1977, Corn's property was rezoned to the B-3 zoning classification which permitted Corn to develop the property in any way permitted by the category classification. Although this was a more restrictive classification, it did permit Corn the opportunity to use the property for any economically viable use permitted by the business classification.

4. After passing Ordinances 548 and 549, the City Council voted unanimously to deny approval of CORN's site plan which included construction of a shopping center on the front portion and a mini-warehouse on the rear portion. The City's actions in both passing the ordinances and denying CORN's site plan in accordance therewith were motivated by and substantially related to general welfare concerns about congestion, noise traffic, aesthetics, safety and property values.

5. Ordinance 552, which imposed a 150 day building moratorium on all C-1 property in the CITY, was proposed at the July 12, 1997 meeting and later adopted. The stated purpose of the moratorium was to permit the Planning and Zoning Board, which had purportedly advised that C-1 property abutting residential property should be rezoned, to review the CITY's commercial zoning scheme. Because of the passing of ordinance 549 which rezoned Corn's property from C-1A property, Corn could have used the Parcel fro any use permitted by the B-3 zoning classification.

6. Despite the ability to pursue development on his Parcel in accordance with any use permitted by the B-3 zoning classification, Corn chose not to pursue development

of the Subject Property which he still owns and has never developed. Development of the originally proposed shopping center on the front portion of the Subject Property was possible at any time after July 13, 1977, when the Subject property was rezoned to a B–3 classification. Additionally, at any time after the July 12, 1977 rezoning, CORN could have developed the rear portion of the Subject Property originally planned for mini-warehouses, in any other way permitted by the business zoning category.

THE LEGAL ISSUE DEFINED

CORN asserts that he suffered a temporary taking of the Subject Property if he was denied all or substantially all economically viable use of the Parcel during the moratorium period. The issue remaining on remand is whether Corn was denied all or essentially all economically viable uses of the subject property during the moratorium and, if so, whether such deprivation rises to the level of temporary taking.

CONCLUSIONS OF LAW AND APPLICATIONS TO THE FACTS

1. A just compensation claim, as opposed to other types of takings claims, does not seek "an invalidation of the local authority's application of the regulation," *Eide v. Sarasota County*, 908 F.2d at 721, but simply monetary compensation for the value taken. *Reahard v. Lee County*, 968 F.2d at 1131. Generally, the landowner in a just compensation takings case must demonstrate that his property was "taken," that the regulation "goes too far" and that there is no provision to award him just compensation. *Eide*, 908 F.2d at 720. Therefore, the essential question inherent in a just compensation claim is whether the valid regulation goes so far as to be a taking. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("The general rule at least is, that while

property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.") Further, because takings decisions depend largely upon the particular circumstances in each case, each case is to be decided *ad hoc* by applying the law to the particular facts. *Rehard* 968 F.2d at 1135. A proper takings analysis should address the following questions: (1) the history of the property; (2) the history of the development; (3) the history of zoning regulations; (4) how development changed when title passed; (5) what is the present nature and extent of the property; (6) what were the reasonable expectations of the landowner under state common law; (7) what were the reasonable expectations of the neighboring landowners under state common law; (8) what was the diminution in the investment-backed expectations of the landowner, if any, after passage of the regulation. *Id.* at 1136. Each of the factual issues has been addressed in the Findings of Fact[1] and the legal issues are addressed below.

2. In this Circuit, the first test as set forth in *Nolan* is bypassed because a claim for just compensation necessarily involves a regulation that substantially advances a legitimate government interest. *Reahard v. Lee County*, 968 F. 2d 1131 (11th Cir. 1992). Therefore, because just compensation claims admit and assume that the subject regulation substantially advances a legitimate government interest, the only issue in just compensation claims is whether an owner has been denied all or substantially all economically viable use of his property. *Id. see also Eide*, 908 F.2d at 721; *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 317 (1987); *Ruckleshaus v.*

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[1] The court's prior Findings of Fact are incorporated herein by reference to the extent that they are necessary to support these additional findings.

Monsanto Co., 467 U.S. 986 (1984) (recognizing that governmental action "so complete as to deprive the owner of all or most of his interest" can amount to a taking); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

3. The next question presented then is how far is too far? Using *ad hoc* factual inquiries, the courts have identified several significant factors in determining whether a taking has occurred because government's actions have gone too far and have denied the landowner all or substantially all economically viable use of his property: 1) interference with reasonable investment-backed expectations, and 2) economic impact to the landowner. *Penn Central*, 438 .S. at 1124; *Reahard v. Lee County*, 968 F.2d at 1136. This analysis must be explored in light of developing case law that has shaped and defined the meaning of these factors. *Reahard v. Lee County*, 968 F.2d at 1136.

4. Regarding the deprivation of reasonable investment-backed expectations, the Supreme Court has traditionally looked at the existing use of the property as a basis for ascertaining the owner's "primary expectation concerning the use of his parcel." *Penn Central*, 438 U.S. at 136. In *Andrus v. Allard*, 444 U.S. 51, 66 (1979), the Court specifically rejected the court's giving serious consideration of future profits and anticipated gains when it said that "Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform." *Id.* CORN made no use of the Subject Property since purchasing it in 1966. He did, however, construct and sell residential structures on the land surrounding the Subject Property. In 1977, having attempted no use of the Subject Property for 11 years, CORN submitted his first preliminary site plan for development of the Subject Property and proposed for the first time, construction of mini-warehouses. By that time, he had

completed his build-out of the residential parcels and the Subject Property where the mini-warehouses were to be constructed was, quite literally, in the back yard of residents who had purchased their homes form him. By that time, the use CORN proposed to make of the Subject Property (i.e. construction of a 900 unit mini-warehouse) was contrary to the general welfare concerns about congestion, noise, traffic, aesthetics, safety, and property values. *See Corn* 997 F.2d at 1386. There was no evidence presented that the construction of mini-warehouses was ever CORN's primary expectation for the Subject Property or that he had invested in items specifically suited for a single development project that were rendered unusable, or rendered the Subject Property unusable, for any other purpose for which it could have been developed. Any expectations CORN may have had regarding use of the Subject Property are not backed by any investment other that his original purchase. Further, because the property remained suitable for business development it cannot be said on this record that CORN suffered a diminution in investment-backed expectations.

5. Turning to the economic impact of the town's ordinances and activities on CORN's property, the threshold for finding a taking is the denial of "economically viable uses." *Agins*, 447 U.S. at 260. Compensation is ordinarily required if the challenged restriction made the property "wholly useless" so that "the rights of property . . . prevail over the other public interest." *Penn Central*, 438 U.S. at 128 (citations omitted). To examine this factor, the courts require a "final authoritative determination of the type and intensity of development legally permitted." *MacDonald Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986). "A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes." *Id.*

6. The *Nollan* test that the challenged statute "substantially advance a legitimate state interest" is not to be determined in the context of this just compensation analysis. However, the fact that the stated purpose of Ordinance 552 was to permit the Planning and Zoning Board to review the CITY's commercial zoning scheme in light of its previous suggestion that all C-1 property abutting residential property should be rezoned, is relevant to this court's finding that Ordinance 552 did not go too far. The ordinance initially effected a reasonable 150 day building moratorium on development of all commercial property in the CITY. While the duration of the moratorium was later extended, it cannot be said, in light of the need to satisfy the reasonable purpose of the ordinance and the length of time that CORN's property lay dormant before the enactment of it, that the duration of the moratorium was unreasonable.

7. The moratorium ordinance went far enough to serve its stated purposes but no so far as to justify CORN's just compensation claim. Under the new Zoning Ordinances 549, which the City passes on first reading on July 12, 1977, Corn's property was rezoned from C-1A (commercial to B-3 (business). Accordingly, even during the moratorium on C-1A development, Corn could have developed his property in any economically viable way permitted by the B-3 business-zoned classification. Corn did not present any evidence to prove that, as a matter of fact, his newly zoned B-3 property was rendered wholly useless by the imposition of a moratorium on C-1A property. There is no evidence in this record that during the moratorium period Corn desired to and/or attempted to use his property for any use other that the shopping plaza/mini warehouse development project. There is no evidence in this record that, after 7-12-77 or during the moratorium period on C-1A property, Corn was denied or prohibited the right to develop his property in any way

permissible by the B-3 zoning classification. Accordingly, because there existed economically viable uses of Corn's B-3 property during the moratorium on development of C-1A property , the court finds that Corn was not deprived of all economically viable use of the Subject Property. The fact that before, during, and, it appears, after[2] the moratorium ended, Corn never desired, attempted or was refused permission to develop the Subject Property in any of the many permissible, lawful and profitable ways permitted by the B-3 zoning classification, weighs heavily in the determination that he was never denied all economically viable uses of the property. The evidence established that at all relevant times, Corn persisted in the pursuit of a single development — the mini-warehouses — to the exclusion of all other permissible uses. It was Corn's decision not to pursue the *permissible* B-3 classification uses and not the City's moratorium on development of C-1A property, which resulted in the failure of the Subject Property to be put to profitable use. Corn simply did not prove that during the moratorium period on C-1A property, he was wholly prohibited from developing his B-3 Subject Property.

Accordingly, Corn has failed to carry his burden of proof on the issue of the unavailability of economically viable uses of the subject property. Therefore, because Corn, the landowner, has failed to prove that there was a "taking" or that the regulation "went too far" as this court previously ruled in its Findings of Fact and Conclusions of Law, he is not entitled to just compensation from the Defendant City.

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[2] Even after the state court judge entered an order enforcing the final judgment therein, Corn chose not to pursue development of the Subject Property in any permissible way, which, at the time of the trial in this court, he still owned and had never developed in any way.

In view of the foregoing Supplemental Findings of Fact and Conclusions of Law, it is hereby

ORDERED and ADJUDGED that final judgment be entered in favor of the CITY and the individual defendants and against the Plaintiff CORN, on Count I, the just compensation claim premised upon a temporary taking of the Subject Property during the moratorium.

DONE and ORDERED at West Palm Beach, Florida, this 25th day of April, 1997.

/s/ James C. Paine
UNITED STATES DISTRICT JUDGE

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APPENDIX B

UNITED STATES COURT OF APPEALS,
FOR THE ELEVENTH CIRCUIT.

No. 95-4351.

Herman CORN,

Plaintiff-Appellant,

v.

CITY OF LAUDERDALE LAKES, Howard Craft, Alfonso Gereffi, Jerome Cohan, Morris Klein, Lyman L. Allen, Louis Greenwald, Harry Kaufman,

Defendants-Appellees.

Sept. 23, 1996.

Appeal from the United States District Court
for the Southern District of Florida.

Before COX and BARKETT, Circuit Judges, and BRIGHT*, Senior Circuit Judge.

COX, Circuit Judge:

On this appeal, we address for the fourth time a 20-year-old dispute between Herman Corn and the City of Lauderdale Lakes, Florida (the "City") over the City's refusal to allow Corn to build a mini-warehouse on his property. Corn alleges that the City's actions effected a taking of his property entitling him to just compensation. The district court held that there was no taking of Corn's property. We affirm in part, but must vacate and remand in part for the district court to make further factual findings.

* Honorable Myron H. Bright, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

I. FACTS [1]

A. The Property and Proposed Development

In 1966, Corn purchased 261 acres of land in an unincorporated area of Broward County, Florida. After negotiations with the City about annexation of the land, Corn submitted a proposed development plan. Before annexing Corn's land, the City created a new C-1A zoning category, incorporating the permissible uses in the existing C-1 category and requiring that a site development plan be submitted before building permits would be issued. By ordinance, the City then formally annexed Corn's land. By separate ordinance, Ordinance No. 105, the City zoned Corn's land. Approximately 8.5 acres were zoned C-1A, while Corn's adjacent land was zoned for residential use.

Between 1966 and 1977, Corn developed much of the land according to the development plan originally submitted to the City. His development expenditures exceeded $100,000. The district court found that Corn did not prove that these expenditures were aimed at any specific use of the land, as opposed to general commercial preparation. On the portion of his land zoned residential, Corn built his first single family residences and then condominiums. In April, 1977 Corn submitted and preliminary site plan (the "Site Plan") proposing to construct a 67,000 square foot shopping center and a 900-unit, 103,00 square foot mini-warehouse on the land zoned C-1A (the "Parcel"). At the time, both uses were permitted on land zoned C-1 and, hence, on land zoned C-1A.

Before building his mini-warehouse, Corn had to obtain the approval of the City Council. The City's Planning and

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[1] A more detailed description of this litigation appears in our opinion in Corn v. City of Lauderdale Lakes, 997 F.2d 1369 (11th Cir. 1993), cert. denied, 511 U.S. 1018, 114 S.Ct. 1400, 128 L.Ed.2d 73 (1994).

Zoning Board twice recommended that the City Council approve the Site Plan. The City Council heard from Corn as well as city residents opposing the mini-warehouse project at three public meetings, tabling consideration of the Site Plan at each meeting.

B. The Re-Zoning Ordinances and Moratorium

Before voting on the Site Plan, the City Council eliminated mini-warehouses as a use permitted on C-1A property. At a public meeting attended by Corn's attorney, the City Council passed Ordinance No. 548, eliminating mini- warehouses as a permitted use on C-1 (and consequently C-1A) land. The City Council also passed Ordinance No. 549, re-zoning the Parcel to category B-3, a more restrictive zoning category. Then the City Council voted unanimously to deny approval of the Site Plan.

The City Council also passed Ordinance No. 552, imposing a moratorium on the issuance of building permits for C-1 property to allow the Planning and Zoning Board to conduct a study of the City's zoning scheme. In particular, the study was to address the propriety of situating commercially zoned property adjacent to residential property. Originally, the moratorium was to last for 150 days, but eventually was extended to last almost a year.

The record is ambiguous as to whether the moratorium applied to Corn's property for it's entire duration. By its terms, Ordinance No. 552 applied to C-1 property; the Parcel, however, was re-zoned B-3 by Ordinance No. 549 within a month of the moratorium's inception. The parties have proceeded on this appeal under the assumption that the moratorium nevertheless applied to the Parcel for its duration and prevented Corn from building anything on the Parcel during that time. It is clear that once the moratorium expired on July 4, 1978, the Parcel's B-3 zoning classifica-

tion permitted many uses, including the proposed shopping center, though not a mini-warehouse.

C. The State Court Litigation

In August 1977, Corn filed suit in state court, challenging the City's denial of his Site Plan and the validity of Ordinance No. 548 (prohibiting storage warehouses on C-1 property), Ordinance No. 549 (rezoning Corn's parcel from C- 1A to B-3), and Ordinance No. 552 (imposing the moratorium). The state circuit court found that Corn had "certain vested rights in the zoning classification C-1A . . . as applied to [the] property by Ordinance # 105" and that the City "is estopped to deny [Corn's] rights in such zoning classification." (R. 1, Ex. O) at 14.) The court held that Ordinance No. 548, Ordinance No. 549, and Ordinance No. 552 were "void and unenforceable" as against Corn or the property because, in passing the ordinances, the City failed to follow its own notice and procedural requirements. (Id. at 13.) The court ordered the City to approve Corn's Site Plan when three deficiencies were corrected, (id. at 14), and to issue Corn building permits, (id. at 15).

The state circuit court's judgment was stayed while the City pursued an appeal. In February 1983, the state court of appeals affirmed the circuit court's judgment, finding that substantial evidence supported the circuit court's order equitably estopping the City from denying approval of the Site Plan. City of Lauderdale Lakes v. Corn, 427 So.2d 239, 243 (Fla.Dist.Ct.App.1983). Seven months after the appellate court's mandate issued, Corn submitted a revised site plan of the City. The City Council refused to approve the plan unless Corn platted the property, as required by a Broward County platting requirement enacted since the original Site Plan was submitted.

A year later, Corn filed in the state circuit court a "Motion to Enforce Final Judgment," requesting an order

requiring the City unconditionally to approve the revised site plan and issue a building permit without Corn platting the property. The City did not oppose the motion and, in March 1985, the state court granted Corn relief from the platting requirement. Finally allowed to build his mini-warehouse project, Corn decided not to do so. Instead, he has prosecuted this § 1983 action in federal court for the last twelve years.

II. PROCEDURAL BACKGROUND

In 1984, Corn filed this action under 42 U.S.C. § 1983 against the City, the Mayor, the members of the City Council, and the City Building Official. In Count One of his complaint, Corn alleges a taking of his property without just compensation in violation of the Fifth and Fourteen Amendments.[2] In Count Two, Corn allege that the City's refusal to approve the Site Plan and issue building permits violated his due process rights. Before trial, Corn dismissd Count Three, alleging procedural due process violations, and Count Four, alleging an equal protection violation.

The district court dismissed Corn's complaint on ripeness grounds under Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 105 S. Ct. 3108, 87 L.Ed.2d 126 (1985). This Court reversed and remanded. Corn v. City of Lauderdale Lakes, 816 F.2d 1514 (11th Cir. 1987). On remand, the City moved for summary judgment based on res judicata and the statute of limitations. The district court denied the City's motion but certified its order for interlocutory appeal under 28 U.S.C. § 1292(b). We granted

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[2] The Fifth Amendment's protections apply to the states through the Fourteenth Amendment. See Chicago, B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897). For ease of reference, we refer to Corn's claim as a Fifth Amendment claim throughout this opinion.

permission to appeal and affirmed the denial of summary judgment. Corn v. City of Lauderdale Lakes, 904 F.2d 585 (11th Cir.1990). The case was remanded for trial.

After a bench trial, the district court found that the City had acted arbitrarily and capriciously in denying approval of the Site Plan. The held that the denial violated Corn's substantive due process rights and awarded Corn $727,875.02 in damages. The court reserved judgment on the Fifth Amendment just compensation claim (Count One), finding that damages would be the same as on the substantive due process claim. Not satisfied with the damages award or the district court's dismissal of individual members of the City Council from the suit, Corn appealed. The City cross-appealed.

We reversed, holding that the district court erred in concluding that Corn's substantive due process rights were violated. Corn v. City of Lauderdale Lakes, 997 F.2d 1369. Our painstaking review of the record revealed that Corn had failed to prove that the City had acted arbitrarily and capriciously. Id. at 1373. Indeed, the record affirmatively showed that the City's decision to prevent Corn from building the 900-unit mini-warehouse in a residential area was substantially related to the general welfare. Id. We did not address the other component of the substantive due process claim: Whether Corn was deprived of any constitutionally protected property interest. Id. at 1374. Because the district court had not ruled on the just compensation claim, we remanded for further proceedings. Id. at 1393.

The City and Corn agreed that the district court did not need to conduct a new trial on the just compensation claim. After receiving status reports from the parties, the district court entered its Findings of Fact and Conclusions of Law Upon Remand. The court framed the issue as ''whether CORN's property (either his interest in the land or in the

development project) has been taken without just compensation by virtue of the CITY's ordinances and actions . . ." (R. 273 at 10.) As to whether Corn's interest in the land had been taken, the court engaged in an ad hoc analysis of whether the City's ordinances and actions went "too far" and denied Corn all or substantially all economically viable use of his land. (Id. at 13-14 (citing Reahard v. Lee County, 968 F.2d 1131 (11th Cir.1992)).)

In analyzing whether the City went too far, the court made the following findings as to Corn's reasonable investment-backed expectations:

> In 1977, having attempted no use of the Subject Property for 11 years, CORN submitted his first preliminary site plan for development of the Subject Property and proposed for the first time, construction of mini-warehouses. By that time, he had completed his build-out of the residential parcels and the Subject Property where the mini-warehouses were to be constructed was, quite literally, in the back yard of residents who had purchased their homes from him. By that time the use CORN proposed to make of the Subject Property (i.e. construction of a 900 unit mini-warehouse) was contrary to the general welfare concerns about congestion, noise, traffic, aesthetics, safety, and property values. See Corn 997 F.2d at 1386. There was no evidence presented that the construction of mini-warehouses was ever CORN's primary expectation for the Subject Property or that he had invested in items specifically suited for a single development project that were rendered unusable, or render the Subject Property unusable, for any other purpose for which it could have been developed. Any expectations CORN may have had regarding use of the Subject Property are not backed by any investment other than his original purchase. Further, because the property remained suitable for busi-

> ness development it cannot be said on this record that CORN suffered a diminution in investment-backed expectations.

(Id. at 15-16.)

As to the economic impact of the City's ordinances and actions on Corn's property, court found:

> the fact that the stated purpose of Ordinance 552 was to permit the planning and Zoning Board to review the CITY's commercial zoning scheme in light of its previous suggestion that all C-1 Property abutting residential property should be rezoned, is relevant to this court's finding that Ordinance 552 did not go too far. The ordinance initially effected a reasonable 150 day building moratorium on development of all commercial property in the CITY. While the duration of the moratorium was later extended, it cannot be said, in light of the need to satisfy the reasonable purpose of the ordinance and the length of time that CORN's property lay dormant before the enactment of it, that the duration of the moratorium was unreasonable. It further cannot be said that either the moratorium ordinance or the rezoning ordinances which limited CORN's use of the Subject Property to business, a more restrictive use than commercial, rendered CORN's property "wholly useless." It further cannot be said CORN was deprived of all "economically viable use," thereby requiring that he be compensated by the CITY. The ordinances went far enough to serve their stated purposes but not so far as to justify CORN's just compensation claim.

(Id. at 17.) Thus, the court held that the ordinances did not effect a taking of CORN's property interest in the Parcel. (Id. at 17-18.)

Turning to whether there was a taking of Corn's property with respect to the proposed development project (the "Project"), the court first analyzed whether Corn had any property interest in the Project. (Id. at 18.) The court held that Corn had no property interest in the Project:

> [E]specially considering the fact that even the pre-existing zoning category C-1 required CORN to obtain approval of the CITY before developing his land, the undersigned concludes that the ordinances in question never created a reasonable expectation in CORN which rose to the level of a property interest in the development of his commercial project. It simply cannot be said on this set of fact, that the CITY's application of the ordinances and other actions deprived CORN of a legitimate claim of entitlement. CORN never had an unbridled right to develop his property in any way he so chose so long as it was merely consistent with the zoning requirement. Because the CITY had never granted to CORN an entitlement to freely develop the property without its prior approval, CORN does not have a protected property interest in the commercial development project.

(Id. at 20-21.) Thus, the court entered judgment for the City on Corn's just compensation claim. Corn appeals.

III. ISSUES ON APPEAL

We address two issues on this appeal: (1) whether the district court erred in finding that there was no taking of Corn's property interest in the Parcel; and (2) whether the district court erred in finding that Corn had no property interest in the Project.[3]

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[3] Corn also contends that, in light of subsequent Supreme Court precedent, we should revisit our holding on Corn's last appeal. Accord-

IV. CONTENTIONS OF THE PARTIES

Corn argues that because the state circuit court held that the City could not validly apply the ordinances to the Parcel, the ordinances necessarily went "too far" and thus effected a taking. Alternately, Corn contends that the City deprived him of all economically viable use of the Parcel by rejecting the Site Plan, imposing the moratorium, appealing the state court judgment, and insisting that Corn plat the property. During the moratorium, he argues, all building or development on the Parcel was prohibited. Corn concedes that, after the moratorium, he could develop the Parcel for many other purposes, but contends that he had no legal obligation to do so. Since he could not build the Project until March 1985, and had no obligation to use the Parcel in any other way, Corn argues that he was deprived of all economically viable use of the Parcel until March 1985. By that time, Corn argues, the Project no longer was commercially practicable, and the alleged taking thus matured into a permanent taking.

The City responds that the district court correctly determined that Corn was not deprived of all economically viable use of the Parcel. The City notes that Corn does not dispute that the Parcel could be used for many purposes other than building a mini-warehouse. The City argues that the district court correctly found that the moratorium did not effect a taking because it lasted only as long as necessary to study the commercial zoning scheme.

Corn also contends that the City's denial of permission to build the Project constituted a taking of the Project. Corn

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ing to Corn, under the Supreme Court's decision in Dolan v. City of Tigard, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), we applied the wrong standard in rejecting Corn's substantive due process claim. Corn's contention is meritless. Dolan did not address the type of substantive due process claim asserted by Corn.

grounds this argument on the state circuit court's holding that he had certain vested rights in the C-1A zoning classification and that the City was estopped from denying Corn permission to build the Project. Corn argues that the state court judgment conclusively establishes his just compensation claim as to the Project; in effect, he argues, the state court judgment is a coupon entitling him to a just compensation award when presented to a federal court. All the federal court has to do is determine the amount of compensation due.

The City contends that whether Corn had a property interest in a particular development project is irrelevant to a Fifth Amendment just compensation claim. According to the City, Corn's alleged property interest in the Project properly was the subject of Corn's substantive due process claim, but has no place in a just compensation claim. Even if an interest in a particular project is a cognizable source of a just compensation claim, the City argues, Corn had no property interest in the Project because the district court correctly found that Corn had no legitimate claim of entitlement to build the mini-warehouse.

V. DISCUSSION

A. Whether the City Effected a Taking of the Parcel

To establish a just compensation claim, a landowner must show that the challenged regulation (1) does not substantially advance legitimate state interests, or (2) denies him economically viable use of his land. Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980); Reahard v. Lee County, 968 F.2d 1131, 1135 (11th Cir. 1992). On the last appeal in this case, we held that the ordinances substantially advanced legitimate government interests. Corn, 997 F.2d at 1373. Thus, to establish his just compensation claim with respect to the Parcel, Corn must

show that the ordinances denied him economically viable use of the Parcel.

When a landowner temporarily is deprived of all economically viable use of his land, he is entitled to just compensation for the temporary taking of his property. First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal., 482 U.S. 304, 321, 107 S.Ct. 2378, 2389, 96 L.Ed.2d 250 (1987). Corn divides his claim into several times periods, arguing that there was a temporary taking during the moratorium and until the state court judgment was affirmed and that the temporary taking ultimately matured into a permanent taking. We follow a similar approach, analyzing whether there was a temporary taking separately from Corn's permanent taking claim.

Whether a landowner has been deprived of all or substantially all economically viable use of his property, either permanently or temporarily, is an essentially ad hoc inquiry into whether the regulation goes "too far." MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 349, 106 S.Ct. 2561, 2566, 91 L.Ed.2d 285 (1986). The factfinder must consider (1) the economic impact of the regulation; (2) its interference with the landowner's reasonable investment-backed expectations, and (3) the character of the governmental action. Id. See also Reahard, 968 F.2d at 1136 (listing factors to be considered in analyzing just compensation claim). The district court correctly engaged in an ad hoc analysis of the relevant factors. The court concluded that Corn suffered no diminution in his reasonable investment-backed expectations and that many economically viable uses of the Parcel were permitted.

Except with respect to the moratorium period, the district court's factual findings are not clearly erroneous. Indeed, it is undisputed that, except during the moratorium, Corn could use the Parcel for any use permitted in a B-3 zoning

category, including to build the proposed shopping center. We hold, therefore, that there was no taking of the Parcel after the moratorium expired.

Corn contends that his case is special and not subject to traditional takings analysis. According to Corn, the economic impact of the ordinances and their effect on his reasonable investment-backed expectations are irrelevant because he has obtained a state court judgment holding that the ordinances could not validly be applied to the Parcel. Corn fails, however, to cite any authority for his suggestion that a government automatically is liable to pay just compensation under the Fifth Amendment whenever a zoning authority subsequently is held to be estopped from enforcing a change in zoning. We know of no such rule. The standard for whether regulation effects a taking is whether the landowner has been denied all or substantially all economically viable use of his land. Reahard, 968 F.2d at 1136.

Corn's only argument as to how he has been denied all economically viable use of the Parcel is that he was not legally obligated to use the Parcel for any of the permissible economically viable uses. Because he could not build the mini- warehouse, and was not legally required to build anything else, the argument goes, Corn was left with no economically viable use for the Parcel. Again, Corn cites no authority for his proposition, and we have found none. The standard is not whether the landowner has been denied those uses to which he wants to put his land; it is whether the landowner has been denied all or substantially all economically viable use of his land. See Baytree of Inverrary Realty Partners v. City of Lauderhill, 873 F.2d 1407, 1410 (11th Cir. 1989) (holding that neither inability to develop exactly what developer wanted, deprivation of most beneficial use of land, nor severe decrease in value of property amounts to taking). Because Corn as not denied economically viable use of the Parcel after the expiration of the moratorium, his

claim that there was a taking of the Parcel after the moratorium expired fails.

As to the moratorium period, however, we must remand to the district court for further factual findings. The district court found that the moratorium: (1) served a reasonable purpose; (2) was reasonable in duration, in light of the length of time that the Parcel lay dormant before the moratorium; and (3) did not deprive Corn of all economically viable use of the Parcel. The court then held that the mora-2torium did not effect a temporary taking of the Parcel. The court did not explain, however, whether its holding was based on the reasonableness of the moratorium, the existence of economically viable uses of the Parcel during the moratorium, or both. Nor did the court make any explicit factual findings as to what, if any, economically viable uses of the Parcel were available to Corn during the moratorium.

The district court's factual findings are insufficient for effective appellate review. We are unable to determine from the record whether the district court's conclusion that the Parcel could be put to economically viable use during the moratorium is clearly erroneous. The parties proceed on the assumption that the moratorium prohibited Corn from building anything on the Parcel. However, our review of the ordinances reveals that the Parcel was re- zoned B-3 within a month after the moratorium began, suggesting that the Parcel thereafter may not have been subject to the moratorium. It may be that the district court based its conclusion on a finding that, during the moratorium, Corn could use the Parcel for any use permitted by the B-3 zoning classification, but any such finding was not explicit. Hence, we remand for the court to make findings as to the economically viable uses of the Parcel during the moratorium.

In light of our decision to remand, we need not address Corn's contention that the district court erred in considering

the reasonableness of the moratorium. According to Corn, there was a temporary taking of the Parcel if he was denied all or substantially all economically viable use of the Parcel during the moratorium, regardless of the moratorium's reasonableness. The City responds that there was no taking because the moratorium lasted just long enough to study the City's commercial zoning scheme. We need not address this significant constitutional question of first impression[4] at this juncture, as it may turn out that the moratorium did not deprive Corn of all economically viable use of the Parcel.

B. Whether the City Effected a Taking of the Project

Corn argues that the state court judgment conclusively establishes that he had a property right in the Project which was taken by the City when it denied him permission to build the mini-warehouse. He contends that the City's actions denied him of all economically viable use of the Project, entitling him to just compensation. The City responds that, even if Corn had a property interest in the Project, it is not the type of property interest cognizable in a just compensation claim. According to the City, any proper-

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[4] Neither the Supreme Court not the circuit has addressed whether a temporary moratorium on development necessarily effects a temporary taking. In First English, the Supreme Court assumed that a county ordinance denied the landowner all use of its property for a considerable period of years. 482 U.S. at 322, 107 S.Ct. at 2389. The Court held that the ordinance effected a temporary taking, requiring the county to pay fair market value for the use of the property during that time period. Id. The Court took pains, however, to limit its holding: "We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." Id. at 321, 107 S.Ct. at 2389 (emphasis added). Unlike the moratorium in this case, which had a set expiration date, the ordinance in First English by its terms was indefinite; it would expire only if declared unconstitutional or repealed.

ty interest in the Project properly was the subject of Corn's substantive due process claim and may not be relitigated in the guise of a just compensation claim.

The district court held that Corn had no property interest in developing the Project. In so holding, however, the district court failed to consider the state court's holding that, under Florida law, Corn had acquired certain vested rights in the Project. Nevertheless, we need not decide what preclusive effect, if any, the state court finding of vested rights under state law has in this federal action for just compensation under the Fifth Amendment. We hold that, regardless of what vested rights Corn may have had in the Project under Florida law, a denial of permission to build a particular development project does not, by itself, state a just compensation claim. To recover just compensation, Corn must show that the denial of his rights in the Project denied him all or substantially all economically viable use of the Parcel, not simply economically viable use of whatever property rights he had in the Project.[5]

The Fifth Amendment prohibits the government from taking private property for public use without paying just compensation. The "private property" subject to the Fifth Amendment's prohibition, however, does not include every single property interest recognized by the law. Corn correctly notes that the Supreme Court has recognized that the Just Compensation Clause protects property interests other than just fee simple ownership of land. See, e.g., Dolan v. City of Tigard, 512 U.S. 374, ____, 114 S.Ct. 2309, 2316, 129 L.Ed.2d 304 (1994) (Fifth Amendment protects right to ex-

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[5] The Supreme Court has expressed no view on the proper test to be applied to a takings claim based on a vested rights theory. Williamson County Regional Planning Comm'n, 473 U.S. at 191 n. 12, 105 S.Ct. at 3119 n. 12.

clude others), Nollan v. California Coastal Comm'n, 483 U.S. 825, 831, 107 S.Ct. 3141, 3145, 97 L.Ed.2d 677 (1987) (same). But Corn cites no authority holding that a denial of rights in a particular development project requires just compensation when, as here, the denial substantially advances legitimate governmental interests and does not deny the landowner all or substantially all economically viable use of his land.

The Supreme Court's decisions suggest that a just compensation claim turns on the remaining economically viable uses of the land itself rather than on the ability to take advantage of a particular right relative to the land. In Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), for example, the Court rejected the type of narrow focus on particular rights urged by Corn, characterizing as "quite simply untenable" the suggestion that a taking is established simply by showing that a landowner has been denied the ability to exploit a particular property interest. Id. at 130, 98 S.Ct. at 2662. The landowner in Penn Central argued that New York City had deprived it of any gainful use of the valuable air rights above Grand Central Station and that, regardless of the value of the remainder of the parcel, the city had taken its right to the airspace, entitling it to just compensation measured by the fair market value of the air rights. Rejecting this argument, the Court noted:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. . . .

Id. (emphasis added). See also Andrus v. Allard, 444 U.S. 51, 65-66, 100 S.Ct. 318, 327, 62 L.Ed.2d 210 (1979) (''But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full ''bundle'' of property rights, the destruction of one ''strand'' of the bundle is not a taking, because the aggregate must be viewed in its entirety.'')

It is true that the Supreme Court has found a taking when economically viable uses of the land itself remain. Those cases, however, generally have involved either a physical invasion of the land, see, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982); Kaiser Aetna v. United States, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979), or destruction of a fundamental attribute of ownership, see, e.g., Nollan, 483 U.S. 825, 107 S.Ct. 3141 (right to exclude others), Kaiser Aetna, 444 U.S. 164, 100 S.Ct. 383 (same). Here, of course, Corn's land has not been physically invaded, and Corn does not contend that the right to build a mini-warehouse is a fundamental attribute of ownership or ''one of the most essential sticks in the bundle of rights that are commonly characterized as property.'' Dolan, 512 U.S. at ____, 114 S.Ct. at 2316 (quoting Kaiser Aetna, 444 U.S. at 176, 100 S.Ct. at 391).

Corn correctly notes that the property rights protected by the Fifth Amendment are created and defined by state law. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030, 112 S.Ct. 2886, 2901, 120 L.Ed.2d 798. He errs, however, in suggesting that the Fifth Amendment requires the payment of just compensation for every deprivation of a right recognized by state law. ''Property'' as used in the Just Compensation Clause is defined much more narrowly than in the due process clauses. Pittman v. Chicago Bd. of Educ., 64 F.3d 1098, 1104 (7th Cir. 1995), cert. denied, ___ U.S. ___, 116 S.Ct. 2497, 135 L.Ed.2d 189

(1996); Pro-Eco, Inc. v. Board of Comm'rs of Jay County, Ind., 57 F.3d 505, 511 n. 6 (7th Cir.), cert. denied, ___ U.S. ___, 116 S.Ct. 672, 133 L.Ed.2d 522 (1995). See also Scott v. Greenville County, 716 F.2d 1409, 1421-22 & n. 20 (4th Cir. 1983) (entitlement to building permit is property protected by due process clause but not by Fifth Amendment takings doctrine). Thus, while certain property interests may not be taken without due process, they may be taken without paying just compensation. We think that Corn's right in the Project is such an interest.[6]

Corn contents that this circuit has held that a denial of vested rights in a development project may entitle a developer to just compensation under the Fifth Amendment. According to Corn, A.A. Profiles, Inc. v. City of Fort Lauderdale, 850 F.2d 1483 (11th Cir.1988), cert. denied, 490 U.S. 1020, 109 S.Ct. 1743, 104 L.Ed.2d 180 (1989), and Wheeler v. City of Pleasant Grove, 664 F.2d 99 (5th Cir.1981),

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[6] Our showing that, to recover just compensation, Corn must show that he was denied economically viable use of the Parcel, as opposed to the Project, is compelled by practical considerations as well. Corn's position would require the government "to regulate by purchase." Andrus, 444 U.S. at 65, 100 S.Ct. at 326. Government would be required to pay just compensation whenever it deprived someone of a property interest, regardless of whether the deprivation violated due process or any other constitutional rights. Indeed, the due process clause would become superfluous with respect to government deprivations of property interests. No longer would plaintiffs have to show that the government's actions were arbitrary and capricious or procedurally deficient; showing deprivation of the property right alone would suffice to recover just compensation.

In this case, we need not identify the line between property rights protected by the Just Compensation Clause and those protected only by due process and other constitutional guarantees. We hold only that a denial of Corn's rights in the Project does not require just compensation because economically viable uses of the Parcel remain.

cert. denied, 456 U.S. 973, 102 S.Ct. 2236, 72 L.Ed.2d 847 (1982), establish that a landowner is entitled to just compensation when denied a property interest in a project, regardless of whether the land itself may be put to other economically viable uses. The City contends that A.A. Profiles and Wheeler are better viewed as due process cases rather than as just compensation cases.

Plaintiff in A.A. Profiles planned to operate a wood-chipping business on its land. Plaintiff received the necessary approvals from the city commission, completed the purchase of the land, obtained building permits, and commenced construction on the land. Id. at 1485. Subsequently, the city withdrew its approval, issued a stop work order, and re-zoned the land. Id. Plaintiff alleged that the city's actions violated the prohibition against taking private property without just compensation and procedural due process. Id. We framed the issue as whether the city's actions substantially advanced a legitimate state interest. Id. at 1478. In finding that they did not, we relied heavily on our "indistinguishable" decision in Wheeler. In Wheeler, we held that a city ordinance prohibiting the plaintiff from building an apartment complex for which it had already received a building permit was arbitrary and capricious and therefore violated due process. Id. at 100. We also characterized the city ordinance in Wheeler as a "confiscatory measure," and noted that a regulatory undertaking that is "confiscatory" is a taking. Id.

Though the City correctly notes that the government action in both A.A. Profiles and Wheeler violated due process, we agree with Corn that both cases hold that a denial of rights in a development project may give rise to a just compensation claim as well as to a due process claim. But we cannot agree with Corn's suggestion that, under A.A. Profiles and Wheeler, a developer establishes a just compensation claim simply by showing denial of a vested

right in a particular development project. We based our holding in both cases on the first prong of a just compensation claim, holding that the government action failed to advance a legitimate state interest. A.A. Profiles, 850 F.2d at 1487-88; Wheeler, 664 F. 2d at 100. We did not mention the "economically viable use" prong of a just compensation claim. Neither A.A. Profiles nor Wheeler address the issue in this case: whether government actions substantially advancing legitimate state interests effect a taking when they deny economically viable use of a particular development right but allow the land itself to be used for many economically viable uses.

For the reasons discussed above, we hold that the government does not effect a taking when its actions substantially advance legitimate state interests and leave economically viable uses of the land itself. Thus, Corn may recover just compensation only to the extent that he was denied economically viable use of the Parcel; he may not recover just compensation for any denial of his rights in the Project that did not also deny him economically viable use of the Parcel.

VI. CONCLUSION

We vacate the district court's judgment on Corn's claim that the moratorium effected a temporary taking of the Parcel because the district court's findings are not sufficient for effective appellate review. We remand for the district court to make further factual findings on that claim. In all other respects, the district court's judgment is affirmed.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-4351

HERMAN CORN,

Plaintiff-Appellant,

versus

CITY OF LAUDERDALE LAKES, HOWARD CRAFT, ALFONSO GEREFFI, JEROME COHAN, MORRIS KLEIN, LYMAN L. ALLEN, LOUIS GREENWALD, HARRY KAUFMAN,,

Defendants-Appellees.

[stamp—Filed, U.S. Court of Appeals, Eleventh Circuit, MAR 20 1997, Miguel J. Cortez, Clerk]

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, _____F.2d_____).

Before: COX and BARKETT, Circuit Judges, and BRIGHT*, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the

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* Honorable Myron H. Bright, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ E. R. Cox
UNITED STATES CIRCUIT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-6034-CIV-PAINE

HERMAN CORN, Trustee

Plaintiff,

vs.

CITY OF LAUDERDALE LAKES, a Florida municipal corporation; HOWARD CRAFT; ALFONSO GEREFFI; JEROME J. COHAN; MORRIS KLEIN; LYMAN L. ALLEN; LOUIS GREENWALD; and HARRY KAUFMAN,

Defendant.

[Filed by ____, JUN 13 1994, T. G. Cheleotis, Clerk U.S. Dist. Ct., S.D. of Fla.-W.P.B.]

FINAL JUDGMENT

This matter came on for consideration before the court, the Honorable Judge James C. Paine, presiding, upon a bench trial which was held on August 12-15, 1991, and upon remand from the Eleventh Circuit as set forth in *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369 (11th Cir. 1993). The evidence having been duly presented and the issues having been duly heard, on June 3, 1994, the court rendered Findings of Fact and Conclusions of Law. In accordance with the court's findings and conclusions, it is hereby

ORDERED and ADJUDGED that final judgment is entered in favor of the CITY and the individual defendants and against the Plaintiff CORN, on Count I, the just compensation claim. Further, in view of the Eleventh Circuit mandate, it is

ORDERED and ADJUDGED that final judgment is entered in favor of the CITY and the individual defendants and against the Plaintiff CORN, on Count II, the substantive due process claim.

Dated at West Palm Beach, Florida, this 10th day of June, 1994.

T.G. CHELEOTIS
Clerk of Court

By: /s/ Svava Ringheim
Svava Ringheim, Deputy Clerk

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-6034-CIV-PAINE

HERMAN CORN, Trustee

Plaintiff,

vs.

CITY OF LAUDERDALE LAKES, a Florida municipal corporation; HOWARD CRAFT; ALFONSO GEREFFI; JEROME J. COHAN; MORRIS KLEIN; LYMAN L. ALLEN; LOUIS GREENWALD; and HARRY KAUFMAN,

Defendant.

[Filed by ____, JUN 13 1994, T. G. Cheleotis,
Clerk U.S. Dist. Ct., S.D. of Fla.-W.P.B]

FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON REMAND

This matter is before the court upon a bench trial which was held on August 12-15, 1991, and upon remand from the Eleventh Circuit as set forth in *Corn v. City of Lauderdale Lakes,* 997 F.2d 1369 (11th Cir. 1993).

FINDINGS OF FACT

1. Prior to June 1966, Plaintiff, HERMAN CORN, TRUSTEE (''CORN''), acquired 261 acres of real property located in the unincorporated area of Broward County which was then zoned for agricultural uses.

2. After preliminary negotiations with the Defendant CITY OF LAUDERDALE LAKES (the ''CITY'') concerning possible annexation of his land, CORN presented a proposed development plan.

3. On July 12, 1966, the CITY adopted three ordinances as follows:

a. Ordinance 103 created a C-1A zoning category within the CITY, incorporating the permissible uses of the pre-existing category and requiring the submission of a site development plan before issuance of a building permit;

b. Ordinance 104 formally annexed CORN's land; and

c. Ordinance 105 designated various zoning classifications for different portions of CORN's land, including a C-1A designation for an approximately 8.5 acre portion bounded to the south by Canal C-13 and to the east by U.S. 441 (the ''Subject Property''). The land immediately north and west of the Subject Property was concurrently zoned for residential use.

4. The uses permitted in the pre-existing zoning category included fertilizer sales, animal boarding kennel, automobile paint shop, storage warehouse, railroad freight or passenger station, and sheet metal shop.

5. Between 1966 and 1977, CORN developed much of his land in accordance with the plan originally submitted to the CITY. This included construction and sale of residential units on the land surrounding the Subject Property. As part of this plan, CORN constructed waterways along the north and west boundaries of the Subject Property, to form a buffer between it and the adjacent residential area on which he was building and selling residences.

6. CORN spent in excess of $100,000.00 preparing the Subject Property to be developed but CORN did not prove whether this money was directed toward general commercial/business preparation or for the single specific use which the CITY later banned. Corn did not prove that the money he spent was spent with the expectation that he would construct mini-warehouses on the Subject Property.

7. During 1975, the CITY retained the services of a land use planner, who questioned the propriety of C-1A zoning for the Subject Property. No formal action, however, was taken with respect to changing the zoning classification of the Subject Property until July 12, 1977.

8. On April 1, 1977, CORN submitted a preliminary site plan for development of the Subject Property. The site plan depicted the construction of an approximately 67,000 square foot shopping center on the eastern portion of the Subject Property, which would front U.S. 441, and an approximately 103,000 square foot, 900 unit mini-warehouse on the western, or rear portion.

9. Many CITY residents who had purchased residences which were constructed and developed by CORN around the Subject Property, publicly opposed CORN's proposed commercial project on the Subject Property.

10. On May 12, 1977, the CITY's Planning and Zoning Board recommended that the City Council, the body authorized the make a final decision regarding the site plan, issue approval of CORN's site plan. At the request of the City Council, the Planning and Zoning Board again considered CORN's site plan at a public meeting held May 26, 1977. By letter dated May 27, 1977, the Planning and Zoning Board re-affirmed its May 12 recommendation of approval.

11. At public meetings held May 31, June 14, and June 21, 1977, the City Council heard from the surrounding home owners who complained about the likelihood of negative effects such as congestion, noise, traffic, aesthetics, safety and property values. The homeowners, who had purchased homes on the surrounding property which was developed by CORN, had reasonable expectations that the Subject Property would be developed in the manner represented to them by CORN at the time they purchased it and not in any manner that was contrary to their general welfare

concerns such as congestion, noise, traffic, aesthetics, safety and maintenance of property values. At each meeting, the City Council tabled consideration of CORN's site plan.

12. On July 12, 1977, the City Council discussed changes in both the uses permitted within C-1A property and the zoning classification of CORN's property. The City Council in fact passed two ordinances on first reading that were ultimately adopted:

a. Ordinance 548 amended Article XXXVII, Section 37.2 of the Broward County Zoning Classification Restrictions and Regulations, as adopted by reference, to eliminate storage warehouses as a permitted use in category C-1, the pre-existing category at the time of annexation, and consequently, category C-1A, the category created for the Subject Property after annexation; and

b. Ordinance 549 rezoned the Property from C-1A (commercial) to B-3 (business), a more restrictive category.

13. After passing Ordinances 548 and 549, the City Council voted unanimously to deny approval of CORN's site plan. The City's actions in both passing the ordinances and denying CORN's site plan were motivated by and substantially related to general welfare concerns about congestion, noise, traffic, aesthetics, safety and property values.

14. Ordinance 552, which imposed a 150 day building moratorium on all C-1 property in the CITY, was proposed at the July 12, 1977 meeting and later adopted. The stated purpose of the moratorium was to permit the Planning and Zoning Board, which had purportedly advised that C-1 property abutting residential property should be rezoned, to review the CITY's commercial zoning scheme.

15. Corn sued these same Defendants in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, seeking, *inter alia*, a writ of mandamus

directing the City Council to approve CORN's site plan, a declaration that Ordinances 548, 549 and 552 ware invalid, and monetary damages for inverse condemnation. The inverse condemnation claim was voluntarily dismissed.

16. Through Ordinance 568, the City Council extended the building moratorium through July 4, 1978.

17. On October 20, 1978, following a three-day non-jury trial, the state court judge entered Final Judgment in favor of CORN, concluding that CORN's conduct in reliance upon the C-1A status of the Subject Property since 1966 created vested rights, which the CITY was equitably estopped to deny. Accordingly, the state court judge declared Ordinances 548, 549, and 552 void and unenforceable against CORN or the Subject Property, and directed the CITY to approve CORN's site plan and issue a building permit upon correction of three technical deficiencies.

18. The state court final judgment was stayed pending appeal to the Fourth District Court of Appeal.

19. On February 16, 1983, the state court of appeal upheld the trial court's application of the doctrine of equitable estoppel and the propriety of mandamus, thereby affirming the state court final judgment. The appellate court issued a mandate on March 4, 1983, at which time its opinion became final.

20. In October, 1983, seven months after the appellate mandate, CORN submitted a revised site plan which addressed the technical deficiencies cited by the state court, to the CITY for approval consistent with the state court opinion.

21. The City Council refused to approve Corn's revised site plan unless Corn platted the Property in accordance with a Broward County platting requirement imposed after July, 1977.

22. On January 17, 1984, CORN filed this action seeking damages under 42 U.S.C. §1983 for violation of civil rights granted under the takings clause of the Fifth Amendment, the due process clause of the Fourteenth Amendment, and the equal protection clause of the Fourteenth Amendment.

23. On October 26, 1984, Corn filed a motion to enforce the state court final judgment asserting that the City Council erroneously applied the platting requirement to him because it was enacted after he should have been granted approval for his original site plan.

24. The state court judge entered an order enforcing the state court final judgment, and concluded that CORN was entitled to issuance of the building permit without platting the Subject Property.

25. However, Corn chose not to pursue development of the Subject Property which he still owns and has never developed. Development of the originally proposed shopping center on the front portion of the Subject Property was possible at any time after July 4, 1978, when the moratorium on development of commercial property in the CITY ended. Further, at any time thereafter, CORN could have developed the rear portion of the Subject Property originally planned for mini-warehouses, in any other way permitted by the business category.

26. On October 22, 1985, United States District Court Judge Jose A.Gonzalez, Jr. dismissed this federal court action as not ripe. The Eleventh Circuit Court of appeals reversed the dismissal and remanded the matter back to the district court.

27. Upon remand, this court entered an order concluding that CORN's cause of action was not barred by the statute of limitations or by the doctrine of res judicata. The Eleventh Circuit affirmed this holding in *Corn v. City of Lauderdale*

Lakes, 904 F.2d 585 (11th Cir. 1990), and the matter was again sent back to this court.

28. Once again in district court, CORN dismissed Defendant BEN EIGNER from the action and also dismissed Counts III, and IV.

29. By order dated July 1, 1988, this court granted a motion to dismiss the individual defendants and dismissed them on legislative immunity grounds.

30. On August 12-15, 1991, this court held a bench trial at which the parties presented evidence on Counts I (a just compensation taking claim), and II (a substantive due process claim).

31. Finding that the CITY had acted arbitrarily and capriciously in denying approval of Corn's site plan, this court entered judgment for CORN on Count II, the substantive due process claim. Having calculated an award of damages on the substantive due process claim totaling $727,875.02, this court determined that the calculatin of damages would be the same under either Count and that judgment on that claim made CORN whole. Accordingly, the court did not address the merits of CORN's Fifth Amendment just compensation claim, as set forth in Count I.

32. On October 7, 1991, in an order in response to CORN's motion to amend the judgment, this court concluded hat as to the front portion of the Subject Property, on July 4, 1978, CORN regained all his sticks in the bundles of rights commonly characterized as property. This determination necessarily means that the CITY had not gone too far or taken CORN's property, thus requiring compensation.

33. On appeal, the Eleventh Circuit held that (1) the CITY's refusal to permit developer to proceed with construction of a 900-unit mini-warehouse development in residential area is not arbitrary and capricious, in violation

of due process, and (2) council members were not entitled to legislative immunity with regard to CORN's just compensation claim. *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369 (11th Cir. 1993).

34. As noted by the appellate court, what began as four claims has been whittled over the years to one, a just compensation claim. The parties agree that there is no need for additional proceedings before the court on Plaintiff's remaining claim because this issue was fully briefed and presented to this court during the August 12-15, 1991 bench trial.

THE LEGAL ISSUE DEFINED

CORN asserts through his just compensation claim that the impact of the CITY's invalid regulations effected a taking of his property interest in either the Subject Property or his proposed development project. Therefore, the issue in this case is whether CORN's property (either his interest in the land or in the development project) has been taken without just compensation by virtue of the CITY's ordinances and actions affecting each.

CONCLUSIONS OF LAW

1. There are four distinct types of constitutional challenges to zoning ordinances. *Eide v. Sarasota County*, 908 F.2d 716, 720-22 (11th Cir. 1990), *cert. den.*, 498 U.S. 1120 (1991). In the present case, the plaintiff has asserted that the CITY, through its ordinances and actions has taken his property without just compensation, in contravention of the Fifth Amendment (a just compensation claim).

2. The Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.

3. The takings clause applies to states and their political subdivisions through the Fourteenth Amendment. *See Wheeler v. Pleasant Grove*, 833 F.2d 267, 270 n. 3 (11th Cir. 1987), *reh. den.* 844 F.2d 794 (1988) (en banc).

4. Resolution of a takings issue generally depends on whether the CITY's actions bear a substantial relationship to a valid public purpose. *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Even so, its actions could go too far. *Penn Central Transportation Co. v. N.Y.C.*, 438 U.S, 916 (1978).

5. In *Nollan* the Court employed strict scrutiny to examine the fit between the challenged regulation and the claimed state interest. *Nollan* generally requires that the regulation at issue in takings case "substantially advance a legitimate state interest." *Nollan*, 483 U.S. at 834. Addressing the necessary nexus between the regulation and the state interest, the *Nollan* court recognized that a "broad range of governmental purposes and regulations satisfies these requirements." *Id.* at 835. These include open spaces, scenic zoning, landmark preservation, and residential zoning. *Id.* A restriction or condition on development that furthered these ends, therefore, would be constitutional, even if it required a concession of property rights by the landowner. *Id.* at 835-37.

6. The City's ordinances and actions as applied to CORN's property also must pass the three factor *Penn Central* test to insure that they do not go too far and thereby affect a taking. *Penn Central*, 438 U.S. 104. The Court "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injury caused by public action be compensated by government rather than remain disproportionately concentrated on a few persons." *Penn Central*, 438 U.S. at 1240.

7. A just compensation claim, as opposed to other types of takings claims, does not seek "an invalidation of the local authority's application of the regulation," *Eide v. Sarasota County*, 908 F.2d at 721, but simply monetary compensation for the value taken. *Reahard v. Lea County*, 968 F.2d at 1131. Generally, the landowner in a just compensation takings case must demonstrate that his property was "taken," that the regulation "goes too far" and that there is no provision to award him just compensation. *Eide*, 908 F.2d at 720. Therefore, the essential question inherent in a just compensation claim is whether the valid regulation goes so far as to be a taking. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.") Further, because takings decisions depend largely upon the particular circumstances in each case, each case is to be decided *as hoc* by applying the law to the particular facts. *Reahard* 968 F.2d at 1135. A proper takings analysis should address the following questions: (1) the history of the property; (2) the history of development; (3) the history of zoning regulation; (4) how development changed when title passed; (5) what is the present nature and extent of the property; (6) what were the reasonable expectations of the landowner under state common law; (7) what were the reasonable expectations of the neighboring landowners under state common law; (8) what was the diminution in the investment-backed expectations of the landowner, if any, after passage of the regulation. *Id.* at 1136. Each of the factual issues has been addressed below.

8. In this Circuit, the first test as set forth in *Nolan* is bypassed because a claim for just compensation necessarily involves a regulation that substantially advances a legitimate government interest. *Reahard v. Lee County*, 968 F.2d 1131 (11th Cir. 1992). Therefore, because just compensation

claims admit and assume that the subject regulation substantially advances a legitimate government interest, the only issue in just compensation claims is whether an owner has been denied all or substantially all economically viable use of his property. *Id.*; *see also Eide*, 908 F.2d at 721; *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 317 (1987); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (recognizing that governmental action "so complete as to deprive the owner of all or most of his interest" can amount to a taking); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

9. The next question presented then is how far is too far? Using *ad hoc* factual inquiries, the courts have identified several significant factors in determining whether a taking has occurred because a government's actions have gone too far and have denied the landowner all or substantially all economically viable use of his property: 1.) interference with reasonable investment-backed expectations, and 2) economic impact to the landowner. *Penn Central*, 438 U.S. at 124; *Reahard v. Lea County*, 968 F.2d at 1136. This analysis must be explored in light of developing case law that has shaped and defined the meaning of theses factors. *Reahard v. Lee County*, 968 F.2d at 1136.

10. Regarding the deprivation of reasonable investment-backed expectations, the Supreme Court has traditionally looked at the existing use of the property as a basis for ascertaining the owner's "primary expectation concerning the use of his parcel." *Penn Central*, 438 U.S. at 136. In *Andrus v. Allard*, 444 U.S. 51, 66 (1979), the Court specifically rejected the court's giving serious consideration of future profits and anticipated gains when it said that "Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform." *Id.* CORN made no use of the Subject Property since purchasing it in 1966. He did, however, construct and

sell residential structures on the land surrounding the Subject Property. In 1977. having attempted no use of the Subject Property for 11 years, CORN submitted his first preliminary site plan for development of the Subject Property and proposed for the first time, construction of mini-warehouses. By that time, he had completed his build-out of the residential parcels and the Subject Property where the mini-warehouses were to be constructed was, quite literally, in the back yard of residents who had purchased their homes from him. By that time, the use CORN proposed to make of the Subject Property (i.e. construction of a 900 unit mini-warehouse) was contrary to the general welfare concerns about congestion, noise, traffic, aesthetics, safety, and property values. *See Corn* 997 F.2d at 1386. There was no evidence presented that the construction of mini-warehouses was ever CORN's primary expectation for the Subject Property or that he had invested in items specifically suited for a single development project that were rendered unusable, or rendered the Subject Property unusable, for any other purpose for which it could have been developed. Any expectations CORN may have had regarding use of the Subject Property are not backed by any investment other than his original purchase. Further, because the property remained suitable for business development it cannot be said on this record that CORN suffered a diminution in investment-backed expectations.

11. Turning to the economic impact of the town's ordinances and activities on CORN's property, the threshold for finding a taking is the denial of "economically viable use." *Agins*, 447 U.S. at 260. Compensation is ordinarily required if the challenged restriction made the property "wholly useless" so that "the rights of property . . . prevail over the other public interest." *Penn Central*, 438 U.S. at 128 (citations omitted). To examine this factor, the courts require a "final authoritative determination of the type and intensity

of development legally permitted.'' *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986). ''A court cannot determine whether a regulation has gone ''too far'' unless it knows how far the regulation goes.'' *Id.*

12. The *Nollan* test that the challenged statute ''substantially advance a legitimate state interest'' is not to be determined in the context of this just compensation analysis. However, the fact that the stated purpose of Ordinance 552 was to permit the Planning and Zoning Board to review the CITY's commercial zoning scheme in light of its previous suggestion that all C-1 property abutting residential property should be rezoned, is relevant to this court's finding that Ordinance 552 did not go too far. The ordinance initially effected a reasonable 150 day building moratorium on development of all commercial property in the CITY. While the duration of the moratorium was later extended, it cannot be said, in light of the need to satisfy the reasonable purpose of the ordinance and the length of time that CORN's property lay dormant before the enactment of it, that the duration of the moratorium was unreasonable. It further cannot be said that either the moratorium ordinance or the rezoning ordinances which limited CORN's use of the Subject Property to business, a more restrictive use than commercial, rendered CORN's property ''wholly useless.'' It further cannot be said CORN was deprived of all ''economically viable use,'' thereby requiring that he be compensated by the CITY. The ordinances went far enough to serve their stated purposes but not so far as to justify CORN's just compensation claim.

13. Having applied the applicable authority to the pertinent facts, this court finds as a matter of law that the impact of the CITY's invalid regulations did not effect an unconstitutional taking of CORN's property interest in the Subject Property. Under the present set of facts as set forth in the Findings of Fact, this court holds as a matter of law that

justice and fairness do not require that any economic injury suffered by CORN as a result of the CITY's public action be compensated by the CITY. To permit the concentration of economic injury, if any, on CORN, the individual who developed the residential areas of the CITY which would otherwise suffer certain economic injury and negative general welfare problems if CORN's commercial proposal were implemented, is consistent with justice and fairness. Accordingly, CORN is not entitled to an award of just compensation and his claim as stated in Count I must fail on these grounds.

14. Having found that the impact of the CITY's invalid regulations did not effect a taking of CORN's property interest in the Subject Property, this court must determine if the CITY's actions effected a taking of CORN's proposed development project. The threshold issue in this determination is whether CORN had a property interest in the proposed development of the commercial project. The Fifth and Fourteenth Amendments protect all property interests created and defined by state law. *Paul v. David*, 424 U.S. 693, 709 (1976), *reh. den.* 425 U.S. 985. A property interest is generally defined as a "legitimate claim of entitlement." *Perry v. Sindermann*, 408 U.S. 593, 602 (1972). Thus, reasonable expectations in a particular status of property may attain protected property status based upon a state law, regulation, or policy, or a mutually explicit understanding a governmental body puts forth. *Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536 (11th Cir. 1994) (a joint venture has a vested property right in the beneficial use of property granted under a zoning ordinance).

Since there is no factual allegation in the present case which would constitute a mutually explicit understanding between the CITY and CORN, this court must examine Florida law to determine if it created in CORN a reasonable expectation in the commercial status of the land. *Id., see*

also, Reahard, 968 F.2d at 1136 (the court must evaluate the reasonable expectations of the landowner under state common law). While Florida case law does not recognize a vested property right in the mere possession of a building permit, it does recognize a property owner's vested property right where the property owner, with a permit in hand, in good faith makes a substantial change in position or incurs such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired. *Hollywood v. Hollywood Beach Hotel Co.*, 283 So.2d 867 (Fla. 4th Dist. Ct. App. 1973), citing *Sakalsky v. City of Coral Gables*, 151 So.2d 433 (Fla. 1963). Because the CITY had never issued a permit to CORN and CORN did not prove that he in good faith made a substantial change in position or incurred extensive obligations and expenses in relation to the development of his commercial project, it cannot be said that Florida law created in him a reasonable expectation that his commercial mini-warehouse project would be permitted by the CITY.

16. While, like Florida law, this Circuit does not recognize a property right in possession of a building permit, it has acknowledged that property interests and vested rights may arise in some cases from zoning and permit approvals. *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347, 1351 (11th Cir. 1990) (vested rights in plan approvals and building permits); *A.A. Profiles, Inc. v. Fort Lauderdale*, 850 F.2d 1483 (11th Cir. 1988) (vested rights in zoning), *cert. denied*, 490 U.S. 1020 (1989). Applying these principles to the facts of this case, and especially considering the fact that even the pre-existing zoning category C-1 required CORN to obtain approval of the CITY before developing his land, the undersigned concludes that the ordinances in question never created a reasonable expectation in CORN which rose to the level of a property interest in the development of his commercial project. It simply cannot be said on this set of

fact, that the CITY's application of the ordinances and other actions deprived CORN of a legitimate claim of entitlement. CORN never had an unbridled right to develop his property in any way he so chose so long as it was merely consistent with the zoning requirement. Because the CITY had never granted to CORN an entitlement to freely develop the property without its prior approval, CORN does not have a protected property interest in the commercial development project.

17. The court concludes and the parties agree that the Plaintiff's failure to establish liability against the defendants on the just compensation claim, obviates the need to take evidence regarding the individual defendants' defenses of qualified immunity.

In view of the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED and ADJUDGED that final judgment be entered in favor of the CITY and the individual defendants and against the Plaintiff CORN, on Count I, the just compensation claim. Further, in view of the Eleventh Circuit mandate, it is

ORDERED and ADJUDGED that final judgment be entered in favor of the CITY and the individual defendants and against the Plaintiff CORN, on Count II, the substantive due process claim.

DONE and ORDERED at West Palm Beach, Florida, this 13th day of June, 1994.

/s/ James C. Paine
UNITED STATES DISTRICT JUDGE

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APPENDIX D

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 91-6011.

HERMAN CORN,
Plaintiff-Appellant, Cross-Appellee,
v.
CITY OF LAUDERDALE LAKES,
Defendant-Appellee, Cross-Appellant.

Aug. 13, 1993.
997 F.2d 1369 (11th Cir. 1993)

Appeals from the United States District Court for the Southern District of Florida.

Before HATCHETT, DUBINA and CARNES, Circuit Judges.

CARNES, Circuit Judge:

This case involves a zoning dispute between the City of Lauderdale lakes, Florida, and a developer, a dispute that has generated a large volume of litigation in state and federal courts during the past sixteen years. In this latest chapter, the district court has found that the City's zoning actions violated the developer's substantive due process rights and, after dismissing the claims against individual City Council members, the district court has awarded damages against the City. The developer has appealed contending that the district court awarded insufficient damages and should not have dismissed the Council members. The City has cross-appealed on the liability issue. We hold that the district court erred in concluding that the City's zoning actions violated substantive due process, and we reverse on that basis, which renders moot the developer's appeal of the damages calculations. We also conclude that the district

court erred in part in dismissing the City Council members on legislative immunity grounds and reverse its judgment on that basis as well.

I. INTRODUCTION

The property involved in this case is an 8.5 acre parcel ("the property") that abuts a state highway, a residential condominium complex, and a neighborhood of single family dwellings. The property, along with a much larger tract of land of which it was a part, was annexed by the City in 1966 with the support of the developer, Herman Corn, who sought to increase the value of his holdings. The City originally zoned the property to permit commercial use subject to approval of the City. The property lay idle for years, as Corn developed the adjacent land by selling condominium units and single-family dwellings to the citizens of Lauderdale Lakes. In 1977, Corn submitted to the City a site plan proposing to develop the property into a 67,000 square foot strip shopping center, and behind that, a 900-unit, 103,000 square foot mini-warehouse facility.

The City's Planning and Zoning Board reviewed the site plan for compliance with technical requirements, and after requesting several changes, recommended approval to the City Council. The City Council returned the site plan to the Board for further review, and the Board again recommended approval. Before voting on the site plan, the City Council and the City Building Committee held public hearings at which residents of the neighborhoods adjoining the proposed development voiced strong opposition to the plan, primarily to the mini-warehouse part of it. After discussing the matter at length and hearing from all sides, the City Council at a July 12, 1977 meeting adopted on first reading two ordinances which affected the property. The first

ordinance eliminated mini-warehouses as a permitted use within the relevant zoning classification, and the second one changed the zoning on the property to a more restrictive business classification. Under Council procedures, those two ordinances were not finally enacted and did not become effective until September of 1977. At the same July 12 meeting, and before the two ordinances took effect, the Council voted unanimously to deny approval of Corn's site plan. The next week, the Council adopted a third ordinance, this one imposed a 150-day city-wide moratorium against construction on property in the applicable zoning classification in order to permit completion of a study on the propriety of commercial zoning in residential areas. These actions spawned the litigation that continues to this day.

Herman Corn filed a lawsuit in a Florida state court in August of 1977 challenging the validity of the three ordinances adopted in July and the City's denial of his site plan. After a trial, the state court found that Corn's reliance on the zoning classification of the property in preparing it for development established Corn's vested right to the development and equitably estopped the City from denying approval of the site plan. The court declared the ordinances invalid, directed the City to approve the site plan, and ordered a building permit to be issued after the correction of some technical defects in the plan. That judgment was affirmed by a Florida court of appeals. Then a dispute arose over the City's insistence that Corn comply with a subsequently enacted platting ordinance. After additional litigation, the state court ordered the City to approve the site plan despite Corn's failure to comply with the platting ordinance. Since that time, March of 1985, Corn has had the right to begin development of the property in the fashion he originally intended. Instead of developing the property, however, Corn filed this lawsuit under 42 U.S.C. § 1983

seeking damages for the City's delay in approving development of his property.

Corn's complaint stated four causes of action: an equal protection claim; a Fifth Amendment just compensation claim; a substantive due process claim; and a procedural due process claim. Named as defendants were the City and its Council members in their individual capacities. Corn later voluntarily dismissed his equal protection and procedural due process claims, and was left with a just compensation claim and a substantive due process claim.

The district court first dismissed Corn's action on ripeness grounds. This Court reversed that determination. *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir.1987). On remand, the City renewed its motions to dismiss for failure to state a claim and for summary judgment claiming that the action was barred by res judicata, by the statute of limitations, and as to the individual City Council members, by legislative immunity. The district court granted the motion to dismiss the individual City Council members on legislative immunity grounds. The court refused to grant summary judgment or a 12(b)(6) dismissal to the City based on the statute of limitations and res judicata, but certified its denial as an appealable interlocutory order. This Court affirmed the denial, holding that the action was not barred by res judicata or the statute of limitations. *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir.1990). The case was remanded to the district court again, this time for trial.

The district court then held a non-jury trial, after which it entered findings of fact and conclusions of law. *Corn v. City of Lauderdale Lakes*, 771 F.Supp. 1557 (S.D.Fla.1991). The district court entered judgment for Corn on the substantive due process claim, finding that the City had acted arbitrarily and capriciously in denying

approval of Corn's site plan. The court reserved judgment on the Fifth Amendment just compensation claim, because it considered the calculation of damages under either count to be identical and, thus, judgment on the substantive due process claim served to make Corn whole. The court set damages in the amount of $727,875.02.

Corn filed a motion to amend the findings of fact and conclusions of law. The court granted the motion, in part, to make clear that the individual Council members had been dismissed on legislative immunity grounds earlier. The district court denied the motion in all other material respects and reaffirmed its findings, noting that Corn's motion was largely an improper attempt to take a "second bite at the apple."

Corn, seeking the entire apple, filed this appeal challenging the district court's calculation of damages as well as the dismissal of the individual Council members. The City cross-appealed, arguing that the trial court erred in concluding that the City acted arbitrarily and capriciously thereby violating Corn's substantive due process rights. The City also asks us to revisit our earlier determination that Corn's substantive due process claim is not barred by the statute of limitations, 904 F.2d 585, arguing that that prior holding is not the law of the case. We need not address that contention, because our holding that the district court erred in finding a violation of substantive due process renders the City's statute of limitations attack superfluous.[1] Because Corn's just compensation claim remains to be adjudicated on remand, his contention that the district court erred in

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[1] The City also reiterates its position that this Court erred in its holdings that Corn's entire lawsuit is not barred on grounds of res judicata, 904 F.2d 585, or ripeness, 816 F.2d 1514, but those contentions are clearly foreclosed by the law of the case doctrine.

dismissing the Council members on legislative immunity grounds must be addressed. We decide that the district court erred in dismissing on that ground, but only insofar as denial of the site plan is concerned.

II. STANDARD OF REVIEW

"[T]he ultimate issue of whether a zoning decision is arbitrary and capricious is a question of law to be determined by the court. Although subsidiary facts are properly for the factfinder, the ultimate issue is for the court." *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1578 (11th Cir.1989). Thus, facts determined by the district court are to be respected unless they are clearly erroneous, but our review of the district court's application of law to those facts, including the ultimate determination of whether an action is arbitrary and capricious, is plenary. *See In re Grand Jury Subpoena*, 957 F.2d 807, 809 (11th Cir.1992); *Stephens v. Department of Health and Human Servs.*, 901 F.2d 1571, 1573 (11th Cir.), *cert. denied*, 498 U.S. 998, 111 S.Ct. 555, 112 L.Ed.2d 562 (1990). The same is true of the legislative immunity issue.

III. DISCUSSION OF THE LIABILITY ISSUE

The district court's holding, that the City's refusal to permit Corn to proceed with construction of a 900-unit mini-warehouse development in a residential area violated the Due Process Clause of the United States Constitution, *Corn v. City of Lauderdale Lakes*, 771 F.Supp. 1557 (S.D.Fla.1991), is due to be reversed. The burden is on a developer seeking to establish a substantive due process claim to prove that the governmental body acted arbitrarily and capriciously in refusing permission for the development. The record shows that Corn failed to

carry that burden, and it also affirmatively shows that the City did not act arbitrarily and capriciously.

The district court's error reaches beyond the fisc of one Florida community and the merits of one case. Faithfulness to the teachings of prior decisions of this Court, and thus to the rule of precedent, is also at stake. More broadly, this case involves questions about how decisionmaking is allocated between a democratic institution, such as an elected city council, and the federal courts. It involves fundamental issues about the allocation of rights and powers within our constitutional system. Those issues and questions have all been answered by controlling precedent, but contrary to the way the district court answered them in this case.

A. THE GENERAL LAW APPLICABLE TO LAND USE RESTRICTIONS

Rights do not exist in a vacuum but are defined in a reciprocal relationship to other rights. In land use matters, for example, the rights of a developer are defined in relation to the rights of the constituents of the municipal government to regulate and control the development of land in the community for the greater good as defined by the majority. Of course, the minority, in this case the developer, is not wholly dependent upon the tender mercies of the majority for the definition and protection of the minority's rights. To some extent the minority's rights are protected from majority encroachment by state law enforced through the state court system. In this case, the developer has had resort to those courts to claim his state law protection. Having secured an enforceable state law judgment requiring the City to issue him a building permit on his terms, the developer has decided not to utilize that judgment and

pursue the development. Instead, he has pursued a money judgment for the alleged infringement of his rights — not his rights under state law, but his rights under the Constitution.

The Constitution's allocation or adjustment of the reciprocal right of developers and the community's majority has been settled to a considerable extent in a number of court decisions. Insofar as the Constitution is concerned, a municipal government may control the use of land within its jurisdiction for what it perceives to be the common good, subject only to four restrictions. These four restrictions define the limits of constitutional rights a developer has and thus the constitutional claims he may make against the governmental entity that has restricted his use of land:

> 1. the Fifth Amendment right not to have his land taken without just compensation (a "just compensation" claim);
>
> 2. the Due Process Clause right not to have the use and value of his land infringed upon to such an extent that it is tantamount to having been taken by eminent domain (a "due process takings" claim);
>
> 3. the Due Process Clause right not to have his use of the land restricted arbitrarily and capriciously, which is a right not to have his use of his land restricted for reasons having no substantial relation to the public health, safety, morals, or general welfare (a "substantive due process" or "arbitrary and capricious due process" claim);
>
> 4. the Equal Protection Clause right not be treated in a way that violates that clause (an "equal protection" claim).

Eide v. Sarasota County, 908 F.2d 716, 720-23 (11th Cir.1990), *cert. denied*, 498 U.S. 1120, 111 S.Ct. 1073, 112 L.Ed.2d 1179 (1991); *Executive 100, Inc. v. Martin*

County, 922 F.2d 1536, 1540 (11th Cir.), *cert denied*, __ U.S. __, 112 S.Ct. 55, 116 L.Ed.2d 32 (1991). Subject to those four limitations, the Constitution does not prevent a local government from restricting, controlling, or limiting the development of land to promote what it perceives to be the general welfare interests of the community as a whole.

B. SUBSTANTIVE DUE PROCESS LAW APPLICABLE TO LAND USE RESTRICTIONS

In the district court Corn pressed two claims, a just compensation claim and also a substantive due process claim, which he termed his "main claim." The district court granted judgment in favor of Corn on the substantive due process claim and did not reach the just compensation claim. We have before us for review the district court's holding that in restricting use of his land the City violated Corn's substantive due process rights.

The law in this Circuit is settled, and the parties do not disagree, that there are two components to such a claim. As this Court has said:

> The current test in this circuit as to whether there has been a violation of substantive due process in the context of § 1983 is twofold. First, it must be determined whether there has been a deprivation of federal constitutionally protected interest, and secondly, whether the deprivation, if any, is the result of an abuse of governmental power sufficient to raise an ordinary tort to the stature of a constitutional violation.

Rymer v. Douglas County, 764 F.2d 796, 801 (11th Cir.1985), *quoted in Greenbriar, Ltd. v. City of*

Alabaster, 881 F.2d 1570, 1577 (11th Cir.1989). Applying this test, the district court found that Corn had established both the constitutionally protected interest component and the sufficient abuse of government power component. The two components of the substantive due process test are conjunctive, and a reviewing court finding an absence of one component need not decide whether the other exists. *See, e.g., Greenbriar*, 881 F.2d at 1577 ("In light of our disposition of this case on the basis of the second prong of this test, we need not address the first prong." (footnote omitted).

We need not address questions about the first component, because the district court erred in finding that Corn had carried his burden of proving the second component of a substantive due process claim. The reason a substantive due process claim is also called an "arbitrary and capricious due process claim" is because a showing that the government has acted arbitrarily and capriciously is a prerequisite for such a claim. That is what the second component requires: The plaintiff developer must show that the defendant government or government officials abused power by acting arbitrarily and capriciously, which means that the action "does not bear a substantial relation to the public health, safety, morals, or general welfare." *Eide*, 908 F.2d at 721. This particular requirement, which is dispositive of the present case, was discussed by this Court less than four years ago in the closely analogous *Greenbriar* case:

> It has long been established that zoning regulations will not be declared unconstitutional as violative of substantive due process unless they "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Village of Euclid, Ohio v. Ambler Realty*

> *Co.*, 272 U.S. 365, [394,] 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926) . . . .
>
> . . . [C]ourts have held that a deprivation of a property interest is of constitutional stature if it is undertaken " 'for an improper motive and by means that were pretextual, arbitrary and capricious, and . . . without any rational basis.' " *Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir.1989) (quoting *Hearn v. City of Gainesville*, 688 F.2d 1328, 1332 (11th Cir.1982)).

881 F.2d at 1577. The law has not changed since our *Greenbriar* decision, and Corn does not argue that it has.

The law is also settled that certain interests will provide a rational basis for governmental action restricting land use. The Supreme Court has held that restrictions may be imposed in order to protect "family values, youth values, and the blessings of quiet seclusion." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9, 94 S.Ct. 1536, 1541, 39 L.Ed.2d 797 (1974). Legitimate zoning interests also include protection from the "ill effects of urbanization," *Agins v. City of Tiburon*, 447 U.S. 255, 261, 100 S.Ct. 2138, 2142, 65 L.Ed.2d 106 (1980), the exclusion of industry from residential areas, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926), and the regulation of traffic, *City of Memphis v. Greene*, 451 U.S. 100, 126-29, 101 S.Ct. 1584, 1600-01, 67 L.Ed.2d 769 (1981), and noise, *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). The exercise of police power in this area is not narrowly constrained, because

> [t]he concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to

> determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Berman v. Parker, 348 U.S. 26, 33, 75 S.Ct. 98, 102-03, 99 L.Ed. 27 (1954) (citation omitted).

This Court has held that permissible basis for land use restrictions include concern about the effect of the proposed development on traffic, on congestion, on surrounding property values, on demand for city services, and on other aspects of the general welfare. *Greenbriar*, 881 F.2d at 1580 & n. 20; *Spence v. Zimmerman*, 873 F.2d 256, 260 (11th Cir.1989) (Protection of surrounding neighborhoods from economic, environmental, and aesthetic harm is legitimate.); *Grosz v. City of Miami Beach*, 721 F.2d 729, 738 (11th Cir.1983) (Restriction on organized religious gatherings in residential areas serves zoning interests of reduced traffic, noise, and litter.), *cert. denied*, 469 U.S. 827, 105 S.Ct. 108, 83 L.Ed.2d 52 (1984). Other circuits have also recognized the breadth of the "public welfare" concept. *See, e.g., Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1224 (6th Cir.1992) ("[C]oncerns about traffic and the deterioration of the neighborhood [as a result of a proposed zoning change to permit a fast food restaurant] are rationally related to the goals of zoning." The *Pearson* opinion contains an excellent circuit-by circuit summary of substantive due process zoning cases.); *Rogin v. Bensalem Township*, 616 F.2d 680-, 689-90 (3d Cir.1980) (holding that the defendant township had "a legitimate interest in controlling population growth and density and the zoning amendments [at issue were] a rational and reasonable means to accomplish that purpose"), *cert. denied*, 450 U.S. 1029, 101 S.Ct. 1737, 68 L.Ed.2d 223 (1981); *Construction Indus. Assoc. v. City of Petaluma*, 522 F.2d 897, 905-09 (9th

Cir. 1975) (Land use may be governed in order to preserve small town character and avoid problems associated with uncontrolled growth.), *cert. denied*, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 342 (1976).

Although it is broad, the power of government to control land use and development is not without limitation. The four constitutional doctrines that limit government power in the land use area already have been mentioned. This case concerns the fourth limitation, substantive due process doctrine, which prevents a government from restricting land use for no reason, or for an illegitimate reason such as corruption, racial or ethnic prejudice, or any other illegitimate motivation. *See Greenbrair*, 881 F.2d at 1579 n. 18. The restrictions a government imposes on land use must be substantially related to the general welfare. If not, the governmental action is arbitrary and capricious in violation of substantive due process.

The question posed by the facts of this case is whether the City Council's purposeful action to prevent Corn from building a 900-unit mini-warehouse in a residential area was rationally based upon, *i.e.*, was substantially related to, general welfare interests such as the effect that development would have on congestion, traffic, noise, city services, aesthetics, and surrounding property values. The record facts permit only one correct answer to that question. Because the facts determine this appeal, and because the district court clearly erred in regard to them, we set the facts out in considerable detail. Virtually all of them are undisputed and are drawn from official records admitted into evidence.

C. THE FACTS RELEVANT TO THE SUBSTANTIVE DUE PROCESS ISSUE

When the City agreed to annex Corn's property and to give it a permissive zoning classification, the City was concerned about how Corn would use the property, and it created a new zoning category, C-1A, specifically for that property. The new zoning category reserved for the City the right to control the use of Corn's property. Herman Corn himself admitted that under his agreement with the City, "anything we put in there would first have to be approved by the Council." The property is a parcel of land approximately 8.5 acres in area and bounded by a highway on its east side. To the west of the property lies a complex of single family homes separated from the property by a canal. A condominium complex lies to the north and is also separated from the property by a canal. Corn was the developer for these residential complexes which border his proposed warehouse site.

Even with the right of prior approval reserved to the City, there were early concerns about the zoning of Corn's property. In the 1970s, the City was required to submit a master land use plan to the county. In July of 1975, while the City Council was considering such a plan, Michael Shiff, a land use consultant the City had hired to draft its master land use plan, reported to the Council that it should not zone Corn's land in a way that would permit warehouses that close to a residential development. Shiff recommended that Corn's property should be rezoned, because C-1 and C-1A commercial development (light industrial usage), should not be permitted next to residential areas. He specifically reported: "I don't think you want to put warehouses where you have existing residential development." The City incorporated Shiff's position into the interim land

use plan it adopted and transmitted to county officials, who in turn incorporated it into the interim county plan. The City did not move to rezone the property at that time, because no development was pending, and it was assumed the problem would be taken care of in the final master land use plan that would eventually be developed. As it turned out, the final land use plan was not adopted until 1979.

Corn submitted his first site plan for the development of the property in 1976; the details of it are not clear from the record. Although the Planning and Zoning Board recommended approval of the plan to the City Council, the public opposition to it at a hearing called to consider the plan caused Corn to withdraw it.

In January of 1977, the City Council and the Planning and Zoning Board conducted a joint meeting to discuss the master land use plan that was still being developed for the City. Milton Scheingarten, an architect on the Planning and Zoning Board, had discovered that Corn's property was improperly zoned, because elementary principles of land use planning require a buffer between residential areas and an industrial use, such as warehouses. The Planning and Zoning Board officially recommended to the City Council in that January 1977 joint meeting that Corn's property be rezoned to a more restrictive classification, which would not permit warehouses. Some discussion concerning Corn's property and whether it should be rezoned to prohibit mini-warehouses ensued, but the issue was deferred until a later time.

In April of 1977, Corn submitted a new site plan to the City Council which included a mini-warehouse development as well as a shopping center. The City Council referred the site plan to the Planning and Zoning Board for a review for compliance with the requirements of City agencies. After Corn had made some, but not all,

of the changes recommended by various City agencies, the Board on May 12, 1977 recommended to the City Council that it approve the site plan. The Council requested the Board to consider the plan again, apparently because of concern about fire truck access to the proposed mini-warehouse buildings and property, and the Board reconsidered the plan in a meeting held on May 26, 1977. The next day the Board again recommended approval of the site plan. The Board had five members but only three members voted; the vote was split two to one in favor of recommending approval.

Documents in the record establish, and it is undisputed, that under local law the three-member Planning and Zoning Board has no authority to make the ultimate decision concerning zoning or adoption of site plans. Instead, the authority to make such decisions is vested in the City Council. The Board makes recommendations, but those are merely advisory. The final decision about how land should be zoned and whether a particular development comports with the general welfare of the community is the decision of the City Council. The power to restrict the use of property involves an exercise of the police power, and the City Council alone has the authority to determine whether the general welfare of the community warrants exercise of that power.

In order to investigate whether Corn's proposed development was compatible with the general welfare of the City, the City Council held a number of meetings and public hearings. Corn's son Stephen, who was deeply involved in the proposed development, attended these meetings and represented Corn's interests. Concerned citizens also attended these meetings and were permitted to speak for or against the proposed development. Most of the citizens who spoke were from the neighborhood adjoining the property, and they spoke against the plan, especially the mini-warehouse aspect of it. Various City

officials were also questioned at these meetings about the planned development and the problems it would create. The subjects discussed by Stephen Corn, various citizens, and City officials included problems of congestion, traffic, noise, strain on city services, aesthetics, the character of the surrounding neighborhood, and property values.

1. The May 31, 1977 City Council Meeting

At a meeting on May 31, 1977, the City Council took up the Planning and Zoning Board's recommendation that Corn's site plan be approved. Council member Gereffi asked what would protect the residents of the adjacent condominiums from the mini-warehouses. He wanted to know if they would be looking at blank walls. Questions were also raised about fire hazards and about whether the mini-warehouses could later be turned into things such as second-hand stores. References were made to some 19th Street warehouses which had created traffic and parking problems. The City Council decided to table the proposal until more input could be obtained from residents of the City.

2. The June 14, 1977 City Council Meeting

At a City Council meeting on June 14 1977, the issue was taken up again. Stephen Corn was present and answered questions from the Council members. Expressing concern about the mini-warehouses, Council member Gereffi pointed out that there were condominiums north of Corn's property, and he asked whether there would be big trucks going in and out of the warehouses at midnight, because if so, "these people

living in these condominiums are going to have a headache." Corn responded that the warehouses would be closed at a certain time in the evening.

Council member Gereffi also questioned Stephen Corn about the setback directly in front of the canal between the condominiums and the warehouses and whether that setback was enough to insulate the residents of the condominiums from trucks going back and forth to the mini-warehouses. Council member Gereffi referred to a "Cypress Chase" incident where residents had been kept awake by noise either from air conditioning units on stores in front of them or from refrigerator units on trucks which were left on while the trucks unloaded next door to a residential area. Council member Gereffi asked if refrigerated trucks would be coming to the warehouses, and Stephen Corn said that there would be no reason for them to do so.

The City Council then discussed the reason that Mr. Scheingarten of the Planning and Zoning Board had dissented from the Board's recommendation that Corn's proposal be approved. Mr. Scheingarten dissented because he thought that the plan provided for insufficient parking space and fire truck access. A different member of the Planning Board told the Council that the plan did not provide for retail parking space because it was not intended to be a retail development. Council member Greenwald replied, however, that the property was zoned commercial, and he raised the possibility that Corn could later convert the mini-warehouse units into stores. The Mayor said:

> [T]hat's exactly what happened on 19th St. They came in under the warehouse rules. The warehouse parking strips. After they had everything all built up, they turned them into retail stores, instead of warehouses. And that's the reason the parking is such an incredible

> mess on 19th St. I'm not suggesting that's what you all are intending to do, but it is a fact, that's how 19th St. got to be like it is. With the recommendation of the Planning and Zoning Board.

Because Mr. Scheingarten, the Planning Board member who had dissented from the recommendation of approval, was not present, further consideration of Corn's plan was tabled.

3. The June 21, 1977 City Council Meeting

The third City Council meeting at which Corn's site plan was considered was held on June 21, 1977. At this meeting, Council member Gereffi and Stephen Corn engaged in a discussion about lane width and fire truck access. Council member Cohan was concerned that the planned development might be a potential firetrap because of inadequate space in the lanes and for parking. Gereffi also brought up the subject of refrigerated trucks again, and he asked about truck traffic at the warehouses:

> You got the canal, you got north of the canal is condominiums. You're going to have trucks coming in. These people that bought these condominiums, came down here to live in quiet and peace. How much time, and how often is your trucks going to be running to the mini-warehouses. These are the people that's living in this City. These are the people we have to satisfy. These are the people who are going to have the headaches. As I said before, they came down to get away from ghetto areas. They come down to live in a beautiful

> condominium, they come down to have peace of mind. They retired with that intention. Now, you are going to have to satisfy these people on how the traffic that's going to be running back and forth, within 60 or 80 feet of your warehouses. These are the people who are going to have to be sitting up and taking notice of that, to look out the windows.

Stephen Corn answered by giving the setbacks that would exist from the buildings to the canal, the canal's width, the roadway, and so forth. He also said that at another larger mini-warehouse he had never seen more than fifteen people there at a time.

Several times during the meeting, Council members criticized Corn for not having met with the residents of the adjoining neighborhood to discuss their concerns with them and to satisfy them that his development was not going to ruin their property. He was reminded that those people were taxpayers and voters. At this meeting, citizens were permitted to speak to the Council about Corn's proposed development, and a number of them did speak out in opposition to the plan. Most or all of those who spoke were residents of the neighborhood in which Corn wanted to build his mini-warehouses. One resident was concerned about noise and questioned whether there would be air conditioning units. That resident also expressed concern about the aesthetics and how the back of the warehouses would be landscaped. She also asked about recreational vehicles, like boats, and their storage.

Another resident asked about roadway access to the planned development, pointing out that it was narrow and could cause a "regular tie-up" if two cars met. He said, "[i]t will be a madhouse .... We spent a lot of money for those condominiums and it's a damnable shame what's happening there." Yet another resident expressed the fear that someone might rent several of the

units, knock down their internal walls, and set up a manufacturing plant of some kind. A number of people spoke out about traffic problems and fire hazards that would be created by the mini-warehouses.

The Fire Chief was then asked about the plan, and he said that he was not happy with the lane widths and the space for parking, because it left little room for fire trucks to maneuver.

Finally, the proposal was tabled and referred to the Building Committee with the understanding that some meeting would be arranged with all interested parties invited to attend. Although the exact membership of that committee is unclear, the record does show that one or more Council members and one or more members of the Planning and Zoning Board were on the committee.

4. The Juy 8, 1977 Building Committee Meeting

On July 8, 1977, a meeting of the Building Committee was held and attended by members of the Planning Board, some Council members, and a number of local citizens. The meeting began with a presentation by Stephen Corn of the proposal for the site. A Planning Board member framed the issues for the residents who were present. In doing so, he noted that the Planning Board had requested six months earlier that the Council rezone the property from its current very permissive zoning status, but as it now stood the Planning and Zoning Board had to make its recommendation about Corn's plan under the ordinances currently applicable to the property.

Many citizens made comments at this meeting in opposition to the mini-warehouse aspect of the planned development:

1. Mr. Zorban disputed Stephen Corn's statement that the Fire Department had said that it would have no difficulty gaining access to the development. He questioned the need for 900 mini-warehouses: "It looks awful, it is horrible, if we look out [at] those buildings there is nothing there to look at, it would be like barracks, a prison camp of some kind, it's horrible looking. Now we could beautify it if we put [in] half the amount."

2. Mrs. Schneider complained about the increased noise that would be caused, saying: "There are people who face that area. You're going to have trucks and everything coming in and out. That creates a noise problem too."

3. Another resident questioned whether their fire insurance rates would go up because of the proximity of the mini-warehouses.

4. George Hudson asked about the type of storage that would be permitted. A followup question by Council member Cohan asked whether there would be combustibles stores in the warehouses, and he was told that the landlord probably would not allow that.

5. Eileen Lefkowitz wanted to know whether Corn believed he would be able to rent 900 units of warehouse, and, if not, what his plans were. If he could not rent them, she feared he would tear the individual units down and build a big warehouse like the one on 19th Street. She said the mini-warehouses were "absolutely unnecessary" and not appropriate in a residential area.

6. Bob [last name unknown] raised concerns about the added noise and the traffic hazard that would be caused by this project, and he also expressed concern about what Corn would do if the mini-warehouses didn't work. He was afraid that Corn would let people open up

stores. He was generally concerned that mini-warehouses just did not fit into the neighborhood.

7. Mrs. Smith, who lived on the fourth floor of an adjacent condominium, said that she did not think any amount of landscaping would help her. She would be looking at the roof and 900 doors anyway. She also expressed concern about the inevitable street lighting that would be around the warehouses and said that the development would lower property values. She pointed out that the mini-warehouses she knew of were not in nice residential neighborhoods, and that the development would cause people to come and go at all hours. She noted that Stephen Corn himself was moving out of the neighborhood because he did not want to live in a "downtrodden area." She said that her opinions were shared by everyone who lived in the affected neighborhood.

8. Mr. Lamb said that he had had experience with mini-warehouses, and that he had never seen one in a residential area. He also said that he had seen lots of different little businesses, like television repair shops, being run out of mini-warehouses, and that people would do that on their own. He also expressed his opinion that the proposed development would create hazards, such as fire hazards, and that it did not belong in that area.

9. George Pearle said that although he thought the builder was "eminently within his rights," the question was whether it was "morally right." He stated that the salesman that had sold him his condominium had said the builder planned to declare the land behind the building to be a park or something like that, and he would not have bought his condominium had he known that Corn would attempt to develop the property this way.

10. Morris Davis said that the area was not suitable for any type of commercial use, that it was "unconscionable" for Corn to build a commercial complex so close to

the condominiums, and that the rear portion of the lot should be rezoned to something other than commercial.

Council member Greenwald spoke about how the Corn family's development of the area had been unfair, because it had proceeded from construction of homes to condominiums and now to commercial warehouses, without telling people who bought along the way about the ultimate plan. Greenwald recommended that the matter be forwarded to the City Attorney to see if there was a way to avoid allowing this project to proceed next to residential areas.

5. The July 2, 1977 City Council Meeting

At a July 12, 1977 City Council meeting, lengthy consideration was given to two ordinances relating to Corn's property and to the question of whether his site plan should be approved. One ordinance eliminated mini-warehouses and some other uses from the type of zoning applicable to Corn's property. The other ordinance changed the zoning of Corn's property from commercial to business, a more restrictive classification and one which would not permit mini-warehouses. Both ordinances were enacted or adopted "on first reading" at this meeting, although they did not become law until September of 1977. Before the vote on the two ordinances, Corn was heard through his attorney and through his son, residents of the affected neighborhood were heard, and Council members spoke on the matter. The discussion is instructive to the issue at hand.

Council member Kaufman reviewed for those who had not been present at the July 8, 1977 meeting of the Building Committee what had transpired there. He also said that he had read the Supreme Court's decision in *Village of Belle Terre v. Boraas*, 416 US. 1, 94 S.Ct.

1536, 39 L.Ed.2d 797 (1974), and believed that it authorized the City Council to rezone the property in question in order to protect family values and clean air, secure the blessing of quiet seclusion, and keep the adjoining area a pleasant place for people to live. Referring to what he had heard at the July 8 Building Committee meeting, and to the first ordinance being considered, Council member Kaufman said:

> At that meeting that was stated by the people that live there. They bought the condominiums in the area there, hopefully that they would have a place they could look out to from their windows and have pleasant views, and not to look out into something that perhaps in their opinion is detrimental to their way of life.
>
> I state the facts of this case because it pertains to this. My conclusion, my personal opinion, and after reading this case, I feel the ordinance that has been presented here, in regard to that, is a justified ordinance.

Council member Greenwald then continued the discussion:

> We had this meeting on last Thursday [July 8, 1977]. We had quite a gathering of people there, we had a lot of input from the public. And when we listened very carefully, it dawned upon me personally, that there was something unconscionable about the fact that these mini-warehouses were going to be erected.
>
> When the people got up there and spoke, and pointed out the reasons that they objected, and felt this was unfair. It dawned upon me, although I had seen this site plan previously, that there was something wrong here. That this builder, at this time, after he built the single

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homes, individual dwellings, then he went to the condominiums, put the condominiums up. Wait until he sold out the single homes.

Then went to the condominiums. Completed his condominiums which that area became no longer a certain single dwelling area. Finished his condominiums. Sold out his condominiums.

Then came in and said, I'd like to have a shopping center to the north of 41st St. You remember what happened on that.

Now, he comes in and says, I'd like to have another shopping center on the left of 41st St. That's not enough. Now he says in back of that shopping center on 41st St. to the South, he wants to put up 900 mini-warehouses. 900 mini-warehouses.

When I first learned about this, we asked the person, are you sure its 900? Isn't it 90? He says no, 900. So I looked at the site plan, and I have it in front of me. I think this should be put up on the board. The whole site plan, including the shopping center and the mini plan.

I fully realized that where these mini-warehouses, these 900 mini-warehouses are going to be erected, or supposed to be erected, that that property is zoned C-1. C-1 zoning provides almost any kind of commercial buildings, I understand. There's nothing in C-1 when it was adopted in 1973, which calls for the erection of mini-warehouses. Because in 1973, nobody had by the wildest figment of the imagination had the idea of putting 900 mini-warehouses, which sizes run form 5-1/2 feet wide by 11. To maybe 20 feet, wide.

. . . .

> All the people will see from the 2nd floor to the 3rd floor in spite of trees being put up. At this meeting they were discussing, they will put up high trees, olive trees, we'll have exits, more exits, we'll do this, we'll do that.
>
> But the crux of the matter is, you don't build a cesspool then build a tent around it. We say this. That these people who have these homes, and bought these condominiums have as much vested interest in their land as the builder.
>
> I've spoken to real estate agents, subsequent to this, and they tell me, who in the world is going to come in and buy if they want to sell a condominium, on the second floor, and look down at 900 doors. They will say, I'm buying a scene of doors. This is a doorway house, a stock of doors.
>
> I spoke to Mr. Brady [the City Attorney] on this and right after the meeting, and this was merely a coincidence, right after this meeting when we heard the input from the people, when they pointed out the fact that their homes would be devalued. The extra traffic that will come in there, the possibility of 900 trucks going to each individual mini-warehouse, and loading and unloading. I'm not saying all on one day, but 900 warehouses, 900 trucks.

Council member Greenwald also discussed the history of the C-1 zoning classification that Corn's property then had, which would have permitted mini-warehouses as a use. That zoning classification came about in 1973 when there were builders on the City Council. Corn was the original owner of the land and had it before it had been zoned commercial. Thus, he could not contend that

he had bought the land with a C-1 zoning and that to change the zoning would deprive him of value he had purchased when he obtained the land.

Council member Greenwald concluded his remarks as follows:

> I say this thing is unconscionable. Borrowing a term regarding recreational leases. There's something wrong in it. These people are going to lose their valuation, traffic is going to be jammed up, Oakland Park Blvd ... will be widened and we'll have more traffic. You got 2 shopping centers and then 900 mini-warehouses. We are talking about beautifying our City. Spending money for beautification. We fix up the entrances, with beautification. Now we have this coming into our City.
>
> So I spoke to Mr. Brady [the City Attorney], Mr. Brady said, that the best way to do this, is to change the zoning. We went to court once before with Mr. Corn, and the city in their desire, and the council in their desire, to protect the people who elected them, and put us on the council. To see to their interest. And I say again, I have nothing against builders.
>
> I say to this council, do not table this thing tonight. Vote, to pass it.

The City Council also heard from Corn's attorney who urged rejection of the ordinances and approval of the site plan. The basic theme of his remarks was that changing the zoning of the property and refusing to approve the site plan would violate Corn's rights and lead to legal action. Council member Cohan reacted by characterizing the remarks of Corn's attorney as implied threats, and saying:

> I say to this council that the action that is before the council, has the approval of our City Attorney. And I believe we owe as much respect for his opinions, as for any other attorney.
>
> While this has been said before, I concur. That the basic responsibility of this council, is to safeguard the best interests of the citizens of this City.
>
> I urge this council in making their decision to keep that in mind, as their means of determination.

A discussion between members of the City Council and the City Attorney was followed by a lengthy discussion of setbacks under the ordinance being considered.

The City Council then heard from a number of citizens, all of whom lived in adjoining neighborhoods and all of whom were very much opposed to the mini-warehouses development. A Mrs. Lefkowitz said the planned development would not only devalue their property but the City of Lauderdale Lakes as a whole. She said that the mini-warehouses she had seen were in slum areas, and she repeated a consistent complaint of those who had bought homes, condominiums, or apartments from Corn in that area:

> When Mr. Corn's salespeople sold these apartments, they told the buyers that it was intended to be used as a park. But he did not put anything in writing. We therefore hope that we can have the property rezoned, so that we can be proud of the area.
>
> We will gladly sell the condos back to Mr. Corn if he cares to put mini-warehouses throughout the entire Oakland Estates. Another thing, I would like to add, would Mr. Corn's

> attorney as well as Mr. Corn, like to live next to mini-warehouses?

A Mr. Goldstein commented that the residents of his neighborhood already had enough problems from another shopping center that faced them. He also said:

> I was particularly interested in the comments of the attorney for Mr. Corn, in talking about the vested rights of the owners. Corn property. Never mentioning once, the vested rights of the people living there, whom he has sold the homes to. And as the previous speaker mentioned, I venture to say, he never once mentioned to them, when they purchased, that mini-warehouses were going to be built there. I think he owes them a moral obligation. If not perhaps a legal obligation. To see that they live in the lifestyle he promised them, and I cannot imagine that he for one minute would say, in all honesty that looking out on mini-warehouses, constitutes Florida living.

A Mr. Greenstein and a Mr. Landau also spoke in favor of the ordinances and against Corn's planned mini-warehouses. Mr. Landau described how the development would aggravate existing traffic problems, and he reminded the City Council and Mayor who had elected them:

> At the present time, if I go out of my apartment, it takes me about 10 minutes to enter my apartment due to the heavy traffic. I cannot cross to the recreation area, without taking my life in my hands. Now he suggested another shopping area with 900 warehouses. Now when is this nonsense going to stop? When somebody is going to get killed. Are we going

> to stop then? It's going to be too late. Let's take this under consideration.
>
> I'd like to speak a word now to our distinguished council and the mayor. I remember that every one of you came knocking at our door to support you. We have done that. Today we are knocking at your doors, for the same purpose, to support us for our welfare, and for the welfare of Lauderdale Lakes.

Another resident, Mr. Goldberg, characterized Corn's attitude as "the public be damned."

After all of this discussion, the City Council unanimously adopted or enacted on first reading the proposed ordinance eliminating storage warehouses as a permitted use in property zoned commercial, such as Corn's land. The Council then discussed and adopted or enacted on first reading the other proposed ordinance, which rezoned the property from C-1 to B-3, a more restrictive zoning classification reserved for business usage.

Even though both ordinances were adopted or enacted "on first reading" at this July 12, 1977 meeting, they would not actually take effect until September of 1977. Apparently for that reason, it was necessary for the City Council to pass on Corn's proposed site plan which could have been approved under the then-existing ordinances. Even where existing ordinances permit such approval, the final decision is in the hands of the City Council.

Council member Kaufman was called upon to summarize the discussion of the site plan that had taken place at the July 8, 1977 Building Committee meeting. He said that the people in the adjoining neighborhood objected to mini-warehouses because they would be "an eyesore, not conducive to the esthetic value of what we

are trying to retain in the City of Lauderdale Lakes." He also said that the Building Committee had gone over the entire site plan and into the question of whether the development would create fire and safety hazards.

The Mayor called upon the City Engineer to discuss whether or not Corn's site plan met engineering standards. The City Engineer said that he had submitted letters concerning two aspects of the plan which bothered him "considerably." One problem was that the site plan did not meet applicable parking regulations that had been adopted by the City Council. As laid out in the site plan, the parking spaces would abut directly against the physical building structure, which was not permitted under the regulations. If the parking spaces were put the minimum distance from the building required under the regulations, some of the buildings on the site plan would have to be eliminated. The City Engineer continued, saying:

> We also objected in both of our letters, I'll read from one of those. In our opinion the layout of the mini-warehouses presents serious difficulties relating to fire protection, which could jeopardize the life and property of its occupants.
>
> In both cases, I feel that one entry into this center core area is dangerous. Now, it's a little out of the engineering line, but I felt it had to be pointed out. I feel there should be at least two entrances into any type of a structure of this magnitude.

Council member Cohan stated that the City Engineer's objections confirmed two contentions that he had had for some time, that the parking was wrong and that another roadway was need.

The Mayor pointed out that a number of objections had been made to the plan and that Corn had been given an opportunity to make corrections:

> For example, our Fire Chief pointed out that he was sorely concerned about the possibility of even getting a fire truck in and out of those little alleys in there. I have not seen any sort of recommended changes that the proposed developer that's been done on the site plan.
>
> A number of times, the parking situation has been pointed out, not only that it's limited, that perhaps it's insufficient. But that in fact, according to the codes it just does not meet the law. That's been pointed out a number of times.
>
> We've pointed out that there well may be the opportunity for a number of flammable or otherwise dangerous materials to be stored in the thing, and the City does not have any way to properly police what is stored in all those warehouses. That in fact it might generate a substantial safety hazard.

The Council heard from Corn's attorney and from Stephen Corn at this meeting. Both of them said that the Planning and Zoning Board had approved the site plan, but the Mayor corrected them, saying that the Planning and Zoning Board only made recommendations to the City Council and lacked the power to approve anything. The Mayor also pointed out that the vote of the Board had been split two to one. He reiterated his concern about parking and noted that if the City Engineer is correct

> that the cars cannot be parked that close to the building then they must be moved 5 feet out from the building, then they will be blocking

> those streets, and you won't be able to drive cars through there. You certainly will not be able to drive the fire truck down any one of those streets, if that be the case. Then the site plan very obviously has to be completely and totally revised. If that be the case, certainly there is no way it can be approved at this hour with that stipulation.

Council member Greenwald pointed out that the City Council had on numerous occasions disagreed with the Planning and Zoning Board, which is merely an advisory committee. He also said that "the heart of the issue" is whether the builder would be permitted to build 900 mini-warehouses.

After all of that discussion, the City Council voted unanimously not to approve Corn's site plan.

6. The July 19, 1977 City Council Meeting

At a July 19, 1977 meeting the City Council enacted a moratorium on building permits for property zoned commercial until completion of a study. The study was to be done by the Planning and Zoning Board, in conjunction with the Office of the Consulting City Planner, about the zoning scheme of Lauderdale Lakes, and in particular about commercially zoned property adjacent to residentially zoned property. The Board was charged with preparing a report concerning whether residential property would suffer adverse effects as a result of being situated next to a C-1 zoning district.

7. Results of the Planning and Zoning Board's Study

The Planning and Zoning Board conducted its study of commercially zoned property within the City and reported to the City Council on December 23, 1977. That report noted that there were two areas of land within the City that were zoned commercial at the time the study was ordered (one of which was Corn's property). Both plots of land were adjacent to residential areas. The Board also reported that orderly planning should allow for a buffer zone between residential areas and commercial areas, an intermediate area where the more restricted business zoning is proper. The lack of such a buffer was found to be a great detriment to persons living in the residential area adjacent to a commercial zone. The Planning and Zoning Board recommended that all commercially zoned areas adjacent to residential areas be rezoned to business districts, so that the business district could serve as a buffer between the commercial area and the residential area.

Mr. Shiff, the City's land use consultant, reported to the Planning and Zoning Board that, according to the county zoning regulations as adopted by the City, commercial zoning is "[i]ntended for certain repair and other services, wholesale, storage and warehouse uses and sales of large or heavy machinery and equipment." Mr. Shiff observed that "[t]his category is a highly permissive zoning district which requires a buffer between itself and residential areas." With specific reference to Corn's property, he concluded that the old zoning relationship "without a proper stepdown in zoning categories may have an adverse affect [sic] on the surrounding residential properties." He also recommended that the City rezone each of its commercial lots to business use. Mr. Shiff is the same land use

consultant who had recommended in 1975 that the City not zone Corn's land in a way that would permit construction of warehouses so close to a residential area.

8. Stephen Corn's Concession and the Unanimous Opinions of All of the Land Use Officials and Experts

It is undisputed that no other mini-warehouse complex that anyone knew of had ever been built next to a residential area, as the Corns wanted to build this one. Stephen Corn, in addition to being the developer's son, was the person most responsible for planning the mini-warehouse development. In testifying on the issue of damages at the 1991 trial, he explained why this mini-warehouse project would have been different from any other mini-warehouse project he had ever seen or heard of:

> Well, I know I felt this was a unique location for a mini-warehouse project. Most of them were built, even at the time, were in more commercial areas. They weren't in areas that were residential, and, generally speaking, you did not have property zoned correctly for this use in as good a location. Whether there was any property zoned just like this, I have no idea.

Thus, the very reason this project would have been so valuable to the Corns is that no other municipality would have permitted them to build a mini-warehouse project in a residential area. That fact alone establishes that the City's decision was not arbitrary and capricious.

All municipal land use officials who gave an opinion at any time during the municipal process or at trial

agreed that what Corn wanted to do defied a fundamental precept of good land use policy: industrial uses such as warehouses should not be permitted immediately contiguous to a residential area. The evidence was overwhelming and virtually undisputed that permitting Corn to build his huge warehouse project would have an adverse effect on residential property values.

D. THE DISTRICT COURT'S ERRONEOUS ANALYSIS

The heart of the district court's holding that the City violated Corn's substantive due process rights is contained in the following paragraph from its opinion:

> Nonetheless, the Court, upon an independent review of the evidence, holds that the CITY acted arbitrarily and capriciously. The City Council expressed concern for increased traffic, noise, and other adverse effects allegedly created by mini-warehouses. Yet prior to July 12, 1977, no effort was made to investigate mini-warehouses. Moreover, the City Council targeted only the mini-warehouses use for elimination, leaving a number of uses that arguably cause more traffic, noise, and air pollution; no comparison between mini-warehouses and the remaining permitted uses was ever conducted. *See City of Kissimmee v. Ellis*, 431 So.2d 283, 285 (Fla. 5th Dist.Ct. App.1983) (city cannot prohibit proposed use that is no more obnoxious than permitted use). The moratorium seems nothing more than an attempt at *post hoc* rationalization. *See 11126 Baltimore Boulevard v. Prince George's County*, 886 F.2d 1415, 1425 (4th Cir.1989) (supporting evidence must exist when decision

> made). In short, the City Council was motivated solely by an irrational desire to thwart CORN's plans.

Corn v. City of Lauderdale Lakes, 771 F.Supp. at 1569. The quoted paragraph summarizes the district court's analysis, which contains a clearly erroneous factfinding as well as errors of law. The errors of law include creation of a requirement that a formal investigation precede a land use decision, application of a strict scrutiny standard instead of more deferential review, and misapplication of controlling precedent. We will discuss each of these errors in turn.

1. The Clearly Erroneous Finding About the City's Motivation

Corn argues that the district court's conclusion that the City Council was motivated solely by an irrational desire to thwart his development plans is a factfinding which we can review only for clear error. Assuming, without deciding, that the statement in question is a factfinding, we have no doubt that it is clearly erroneous. Clear error exist when a reviewing court after examining all of the evidence, is left with a definite and firm conviction that a mistake has been made. *See, e.g., Concrete Pipe and Products of California, Inc. v. Construction Lab. Pens. Trust*, __ U.S. __, __, 113 S.Ct. 2264, 2279, 124 L.Ed.2d 539 (1993); *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985); *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948); *United States v. Roy*, 869 F.2d 1427, 1429 (11th Cir.), *cert. denied*, 493 U.S. 818, 110 S.Ct. 72, 107 L.Ed.2d 38 (1989). The evidence, which we have set out at length, leaves us with the definite and firm conviction that the district court was mistaken not

to find that the City's actions were motivated by and substantially related to general welfare concerns about congestion, noise, traffic, aesthetics, safety, property value and the like. There is not evidence that the City had any bad motive; there is no evidence that it acted without a motive.

As discussed earlier, one week after the City Council had decided to enact the rezoning ordinances and to deny approval to Corn's site plan, it passed a moratorium on building permits for commercially zoned areas to stay in effect until completion of a study by the Planning and Zoning Board about commercial zoning and industrial uses contiguous to residential areas. When completed, that study confirmed the wisdom of the action the City had taken. The district court dismissed the moratorium study as "nothing more than an attempt at *post hoc* rationalization." 771 F.Supp at 1569. It is understandable why the timing of the study might undermine its utility as a justification for the City's earlier actions. However, it would be illogical to treat the fact that such a study was ordered as evidence that the prior action had been arbitrary. Governmental actions may be undone as well as done, and there was nothing to prevent the City from reconsidering its actions had the study reached a contrary conclusion. Even if we assume that the moratorium and study which confirmed the wisdom of the City's action was done solely in anticipation of litigation, that is not evidence that the City's earlier actions were arbitrary and capricious. The most we are willing to conclude is that the moratorium and study constitute a wash, it is neither evidence of arbitrariness nor evidence of the lack of it. In any event, it does not appear that the district court treated the moratorium and study as affirmative evidence of arbitrariness. We do not, either.

What counts is not the motivation for the moratorium and study, but the motivation for the earlier action

adopting the rezoning ordinance and denying the site plan. In respect to those actions, the evidence is overwhelming and undisputed. Indeed, most of it comes from public records, the minutes of official meetings which were admitted at the trial without objection. That evidence uniformly and overwhelmingly establishes that the opposition to Corn's 900-unit mini-warehouse project was based on general welfare concerns of City officials and citizens alike. The evidence shows how those general welfare concerns were expressed to the City Council in a series of public hearings at which both sides were heard. The evidence also establishes that the City Council members became convinced that the project was incompatible with the best general welfare interests of the City and acted accordingly in a rational manner. The evidence is not subject to any other plausible explanation. The district court's contrary factfinding is clearly erroneous. We turn now to the two errors of law that also underlie the district court's holding.

2. *The Erroneous Holding that a Formal Investigation is Required for Land Use Decisions*

The district court's holding is based upon the erroneous assumption that government cannot act in land use matters based upon facts gathered at pubic hearings, but must instead conduct a more formal investigation before acting. The court acknowledged that the City Council had expressed concern for general welfare interests and the adverse effects that a 900-unit mini-warehouse project would have upon those interests. The court then dismissed that important fact, because, it said, before the City acted on July 12, 1977, "no effort was made to investigate mini-warehouses." 771 F.Supp. at 1569. The record shows without dispute that at its June

14, 1977 meeting, the City Council investigated the matter by questioning Stephen Corn concerning the particulars of the development of the proposed warehouses, and it discussed the matter with a member of the Planning Board. At its June 21, 1977 meeting, the City Council discussed the matter at length, again questioned Stephen Corn about the proposed development, and listened to a number of citizens who presented reasons why the development should not be permitted. At the July 8, 1977 joint meeting of the Building Committee and some Council members, at least ten citizens spoke about how the development would impact their neighborhood and the City. The proceedings of that meeting were reported to those Council members who had not been present. At the July 12, 1977 City Council meeting itself, before any action was taken, the City Council heard presentations from Stephen Corn, Corn's attorney, the City Attorney, and a number of citizens. During these meetings, the City Council inquired about and heard the opinions of city officials, such as the City Engineer, the Fire Department Chief, and others. Only after the City Council had investigated the matter at length during these meetings did it take any action.

The district court properly rejected the argument that if the City Council blindly followed the will of its constituents who opposed the mini-warehouse project, its action was automatically valid. 771 F.Supp. at 1569. There could be circumstances in which a city's residents wanted a development blocked for illegitimate reasons, such as racial prejudice. But that is not this case. Merely because citizen input may not be a sufficient basis for a rational government land use decision in every instance does not mean it can never be a sufficient basis for such a decision. In most cases it will be. *See Greenbriar*, 881 F.2d at 1579. Where, as here, citizens consistently come before their city council in public

meetings on a number of occasions and present their individual, fact-based concerns that are rationally related to legitimate general welfare concerns, it is not arbitrary and capricious for a city council to decide without a more formal investigation that those concerns are valid and that the proposed development should not be permitted.

The record conclusively demonstrates that the City Council members were presented with abundant information, from all sides, about mini-warehouse projects. In the finest tradition of participatory government, the matter was investigated and resolved in a series of public meetings at which Corn and interested citizens presented information and opinions to the governmental decisionmakers — the members of the City Council. City officials, such as the Fire Chief and the City Engineer offered advice and were questioned. Various participants drew upon their experiences with similar developments and the problems that those developments had caused. As often occur, some misinformation was presented, some information was corrected, and some was contradicted and disputed; but that is the nature of democratic decisionmaking. The information and views the citizens presented to their government officials at these meetings involved the same general welfare concerns that the Supreme Court and this Court have repeatedly held are rational and permissible basis for land use restrictions: noise, traffic, congestion, safety, aesthetics, valuation of adjoining land, and effect on city services.

It is undisputed that prior to the time the City Council made its decision at the July 12, 1977 meeting, there had been four public meetings in the nature of hearings on the issue. Stephen Corn, City officials, and other citizens had presented information and opinions to the municipal decisionmakers. The district court's holding that the City Council's action was arbitrary and

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capricious because, "prior to July 12, 1977, no effort was made to investigate mini-warehouses" amounts to a *per se* rule that no municipality can act rationally on the basis of information gathered at public meetings, but instead must conduct more formal investigations. There is no basis in the Constitution for such a requirement, which would be antithetical to our democratic form of government.

Corn argued before this Court, and apparently convinced the district court, that insufficient investigation was conducted because the Mayor admitted at trial that he had neither personally visited any other mini-warehouse project at the time the City acted, nor had he sent anyone else from the City to inspect an existing mini-warehouse located three miles from the City. Corn's argument is off the point both factually and legally. Factually, the record shows that the Mayor did not vote on the ordinances or the site plan, and Corn failed to prove that the five City Council members who did vote on it had never visited a mini-warehouse project. More fundamentally, the Constitution does not require on-site inspections as a predicate for land use decisions. *See Federal Communications Commission v. Beach Communications, Inc.*, __ U.S. __, __, 113 S.Ct. 2096, 2102, 124 L.Ed.2d 211 (1993) ("[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."). It would be absurd to suggest, for example, that a city council could not rationally decide to forbid construction of a nuclear waste facility near a residential area unless the council members had personally inspected a similar facility before they voted. Before the City Council took action in this case, its members learned about mini-warehouses in general and Corn's planned development in particular. The Constitution requires no more investigation than that.

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3. The Erroneous Constitutional Standard

The district court also erred by applying to the City's actions a strict scrutiny standard of review instead of the deferential review that our decisions require. In concluding that the City had acted arbitrarily and capriciously, the district court reasoned that "the City Council targeted only the mini-warehouse use for elimination, leaving a number of uses that arguably cause more traffic, noise, and air pollution; no comparison between mini-warehouses and the remaining permitted uses was ever conducted." 771 F.Supp. at 1569. That strict scrutiny standard has no place in substantive due process land use doctrine.

The only authority the district court cites for such a heightened standard of review is a Florida appellate court decision that did not even mention substantive due process. *City of Kissimmee v. Ellis*, 431 So.2d 283, 285 (Fla. 5th Dist.Ct.App.1983). Even if that state intermediate appellate court decision had been directly on point, the district court should instead have applied the holdings of *Greenbriar Ltd. v. City of Alabaster*, 881 F.2d 1570 (11th Cir.1989), and other precedent of this Circuit which limits the inquiry to whether the City's action had a rational relationship to a legitimate general welfare concern. No decision of this Court has ever held that the Due Process Clause prevents government from restricting land use to promote the general welfare unless it contemporaneously restricts all land uses in its jurisdiction which "arguably cause" the same or greater adverse effect on the general welfare. We decline to extend the due process clause in such a manner, which would hobble the power of local government to promote the general welfare through land use control.

The district court's criticism of the City for "targeting" mini-warehouses and leaving other uses that "arguably cause" more problems not only reflects application of the wrong legal standard, it also has little or no factual basis in this case. The record is devoid of evidence that when it acted to stop Corn's project the City Council had before it any requests to permit other uses that "arguably cause" the same problems as the mini-warehouses Corn wanted to build. The City retained the right to disapprove any future use that might cause the same problems. Municipal governments, like people, act to deal with the problems with which they are confronted. There is no basis in the Constitution or in common sense for holding that a government cannot solve a problem with which it is confronted unless its solution solves all future problems that may arise as well. Municipal governments have the power to deal independently with the problems of their cities on an as-needed basis; the Constitution does not require that they address in one all-encompassing action every conceivable problem that could arise.

By applying a level of scrutiny that is far too strict, the district court appears to have put itself in the place of the City Council and made a de novo review of whether it would have taken the same action the City Council did. Such scrutiny impinges upon the right and authority of municipalities to make land use decisions and would alter the allocation of functions between municipal governments and the federal courts. This Court has admonished district courts not to usurp the role of city councils and zoning boards:

> We stress that federal courts do not sit as zoning boards of review and should be most circumspect in determining that constitutional rights are violated in quarrels over zoning decisions. *Raskiewicz v. Town of New Boston*,

> 754 F.2d 38, 44 (1st Cir.1985) ("federal courts do not sit as a super zoning board or zoning board of appeals"); *Albery v. Reddig*, 718 F.2d 245 (7th Cir.1983) (federal appeals court should not become accustomed to idea that constitutional rights are implicated in quarrel over zoning rules); *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir.1983) (noting reluctance of federal courts to sit as zoning boards of appeal).

Spence v. Zimmerman, 873 F.2d 256, 262 (11th Cir.1989); *see also Construction Indus. Assoc. v. City of Petaluma*, 522 F.2d 897, 906 (9th Cir.1975) ("Being neither a super legislature nor a zoning board of appeal, a federal court is without authority to weigh and reappraise the factors considered or ignored by the legislative body in passing the challenged zoning regulation."), *cert. denied*, 424 U.S. 934, 96 S.Ct. 1148, 47 L.Ed.2d 342 (1976). In this case, the district court erred by raising the level of constitutional scrutiny to a point where it substituted its judgment for that of the City Council.

4. The Application of Precedent

The district court's holding is plainly inconsistent with this Court's *Greenbriar* decision. In that case there was no formal investigation, and the city's decision was based upon "political pressure" from citizen voters who turned out as a crowd to oppose the development. *Greenbriar*, 881 F.2d at 1579. Despite that fact and the apparent lack of any investigation other than public meetings, in *Greenbriar* this Court held that the city's action in denying permission for the development was not arbitrary and capricious. In doing so, we quoted and

adopted as "apt" the following analysis about "political pressure" as a basis for such decisions:

> [N]othing is more common in zoning disputes than selfish opposition to zoning changes. The Constitution does not forbid government to yield to such opposition; it does not outlaw the characteristic operations of democratic . . . government, operations which are permeated by pressure from special interests. . . . The fact "that town officials are motivated by parochial views of local interests which work against plaintiffs' plan and which may contravene state subdivision laws" . . . does not state a claim of denial of substantive due process.

Id. (quoting *Coniston Corp v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir.1988) (quoting *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 832 (1st Cir.), *cert. denied*, 459 U.S. 989, 103 S.Ct. 345, 74 L.Ed.2d 385 (1982))).

To distinguish the *Greenbriar* decision the district court relied upon *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. Unit B 1981) ("*Wheeler I*"), *cert. denied*, 456 U.S. 973, 102 S.Ct. 2236, 72 L.Ed.2d 847 (1982), and *A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483 (11th Cir.1988), *cert. denied*, 490 U.S. 1020, 109 S.Ct. 1743, 104 L.Ed.2d 180 (1989). It said that "the appellate court in both *Weeler I* and *A.A. Profiles* refused to accept public outcry against a project as evincing a legitimate state interest." 771 F.Supp. at 1569. However, there are clear distinctions between those two cases on the one hand, and both this case and our more recent *Greenbriar* decision on the other hand.

Wheeler I involved a municipality's decision to prevent an apartment complex from being built in a city after a referendum showed overwhelming resistance to it. Unlike the present case, in that case the city's decision "bore no substantial relationship to legitimate concerns for health, safety, welfare, or the general well-being of the community." 664 F.2d at 100. In *Wheeler I*, there was decision by plebiscite; here there was not. In this case, relevant information and legitimate concerns of citizens and officials alike were expressed, discussed, and weighed by the municipal decisionmakers in a process that allowed the developer full input.

A.A. Profiles did not even involve a substantive due process issue, so that decision cannot be controlling. It was a procedural due process and just compensation case, 850 F.2d at 1485, two inquiries that differ from a substantive due process analysis. *A.A. Profiles* is also distinguishable from this case because there the city proffered as a basis for its action "threats of violence by area residents." *Id.* at 1488. There certainly were no threats of violence or attempts at physical coercion in this case; all that was involved was public input into a political decision.

The inapplicability of *Wheeler I* and *A.A. Profiles* to this case is shown by the more recent decision of this Court in *Greenbriar*. While various holdings of that decision have been referred to previously, it warrants more detailed discussion because it is a "red cow" case.[2] In *Greenbriar*, the city council refused to change

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[2] The term "red cow" is used in some legal circles, particularly in Florida, to describe a case that is directly on point, a commanding precedent. *See, e.g., United States v. Kopituk*, 690 F.2d 1289, 1308 (11th Cir.1982), *cert. denied*, 461 U.S. 928, 103 S.Ct. 2090, 77 L.Ed.2d 300 and *cert. denied*, 463 U.S. 1209, 103 S.Ct. 3542, 77 L.Ed.2d 1391 (1983). In other states, the same notion of a closely

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the zoning of a developer's land from single-family residential to "Planned Development District" ("PDD"), which would have permitted multi-family residences, townhouses, accessory structures, and the retail and commercial businesses of a community shopping district. 881 F.2d at 1571-72. One or two public hearings were held before the planning and zoning commission, which ultimately deadlocked on the proposal. After holding its own public hearing on the proposal, the city council rejected it. *Id.* at 1572. Greenbriar, the would-be developer, sued claiming a violation of substantive due process. *Id.* A jury returned a verdict finding that the mayor and city council had been arbitrary and capricious in reaching the decision to deny Greenbriar's PDD zoning application. The district court entered judgment for the developer in accordance with that verdict. *Id.* at 1572-73. This Court reversed. We began our discussion of the legal issues involved in a substantive due process claim by noting:

> It has long been established that zoning regulations will not be declared unconstitutional as violative of substantive due process unless they "are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, [394,] 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926).

(fn. continued)
fitting authoritative decision is conveyed by any of the following terms: "spotted dog," "spotted horse," "white horse," "white pony," or "goose" case. *See Jefferson v. Ysleta Indep. School Dist.*, 817 F.2d 303, 305 n. 1 (5th Cir.1987). We choose "red cow" from the metaphorical menagerie because this is a Florida case and because that metaphor is the strongest one, a red cow being more difficult to overlook than the other animals.

881 F.2d at 577. This Court continued, stating:

> The relevant question for consideration is whether there existed a rational basis for the City's rejection of Greenbriar's plan, or, phrased in the alternative, whether the City's action bore no substantial relation to the general welfare.

Id.

The developer, Greenbriar, argued before this Court that "its proposal for PDD status was well-suited to the needs of the surrounding communities," and that city officials had "acted 'solely on partisan political reasons unrelated to the merits of plaintiffs' proposal. . . .' " *Id.* at 1579 (quoting Greenbriar's brief). Greenbriar also pointed to evidence in the record that council members had been subjected to "political pressure" and that some of them were even "scared of the crowd." *Id.* This Court responded a follows:

> [A] planning commission or a City Council is not a judicial forum; it is a legislative body held democratically accountable through precisely the forms of political suasion to which Greenbriar objects. *See Couf v. De Blaker*, 652 F.2d [585,] at 590 (5th Cir.1981) ("Our opinions repeatedly characterize local zoning decisions as 'legislative' in nature"); *South Gwinnett Venture v. Pruitt*, 491 F.2d [5,] at 7 (5th Cir. 1974) ("local zoning is a quasi-legislative procedure, not subject to federal juridical consideration in the absence of arbitrary action"). Council members who evaluate a proposal in light of their constituents' preferences do not necessarily overlook what Greenbriar contends to be the "merits" of a particular zoning plan. Here, there is no

> indication that Council members' attention to citizens' concerns in assessing Greenbriar's zoning plan deprived their decision of a rational basis.

881 F.2d at 1579 (footnote omitted). This Court said, "it is of some relevance" that at the public hearings "all of the representatives of neighborhood associations that spoke were opposed to the granting of PDD status to the property." *Id.* at 1579 n. 17. Exactly the same is true in this case. This Court went on to hold in *Greenbriar* that the Constitution does not forbid government from yielding to political pressure that is characteristic of democratic government, an the fact that municipal officials are motivated by parochial views of local interest does not state a claim of denial of substantive due process, even if those parochial views contravene state laws. *Id.* at 1579.

How closely the *Greenbriar* decision fits this case can be seen from the following paragraph of our *Greenbriar* opinion, which, with only minor modifications for the names of the parties and the specific proposal being considered, could well have been written for this case:

> Greenbriar has failed to demonstrate that local officials did not rationally conclude that the PDD proposal was not in the best interest of the community. Greenbriar contends that its proposal for PDD status was compatible with the traffic, public health and other needs of neighboring areas, and that the plan was modified to incorporate, and/or account for, each of the suggestions or objections of City officials and surrounding property owners. However, review of the record indicates that several members of the City Council simply disagreed with Greenbriar's assessment of the plan's compatibility with the surrounding area, that

> there existed a rational basis for such disagreement, and that modifications to the plan failed to alleviate their concerns.

Id. (footnote omitted). The concerns that had been expressed to and by the city council members in *Greenbriar* were concerns about the effect of the proposed development on the surrounding neighborhoods, including the effect it would have on the value of the property in those neighborhoods and on the levels of traffic. Again, the following paragraph with which this Court ended its discussion of the substantive due process claim in the *Greenbriar* case could just as easily have been written for this case:

> In sum, review of the record indicates that neighborhood representatives offered several reasons for their opposition to the proposed development, and that Council members properly took those views into account in undertaking their own evaluations of the proposal. Greenbriar has failed to show that Council members acted irrationally or arbitrarily in rejecting the PDD rezoning plan. To the contrary, we conclude that the record clearly reflects a rational basis for the City's decision not to rezone the subject property.

Id. at 1580 (footnote omitted). *Wheeler I* and *A.A. Profiles* are distinguishable from this case. *Greenbriar* is not. It controls this case and requires that we reverse the district court's holding that there was a substantive due process violation.

5. *Summary*

To summarize, we hold that: (1) The district court's factfinding that "the City Council was motivated by an

irrational desire to thwart Corn's plans" is clearly erroneous; (2) The Constitution does not require that a particular type of investigation be conducted before a land use decision is made, and reliance upon facts and opinions presented at public meetings does not render the actions of municipal decisionmakers arbitrary and capricious for substantive due process purposes; (3) The proper substantive due process standard relating to land use restrictions is not whether all land uses that arguably cause the same or greater detriment to general welfare interests were restricted or eliminated, but instead "whether there existed a rational basis for the City's [action], or, phrased in the alternative, whether the City's action bore no substantial relation to the general welfare," *Greenbriar*, 881 F.2d at 1577; and (4) Because there was a rational basis for the City's rezoning ordinances and its rejection of Corn's site plan, or phrased differently, because the City's action was substantially related to the general welfare, its actions did not violate Corn's substantive due process rights.

IV. DISCUSSION OF THE IMMUNITY ISSUE

Our reversal of the district court's holding that the City violated Corn's substantive due process rights renders moot Corn's contentions that the district court erred in calculating damages. Because we remand for further proceedings concerning the remaining just compensation claim, however, Corn's contention that the district court erroneously dismissed the City Council members on legislative immunity grounds is not moot. In its published opinion, the district court entered judgment in favor of the individual City Council members on the grounds that Corn had failed to prosecute his action against them. 771 F.Supp. at 1565. In a later unpublished ruling on Corn's motion to alter or amend the

judgment, the court clarified its holding and stated that it had previously dismissed the City Council members solely on grounds of legislative immunity. We review the holding as clarified and conclude that it is only partially correct.

This Court has extended absolute legislative immunity from suit under 42 U.S.C. § 1983 to purely local legislators in land use and zoning cases. *Brown v. Crawford County*, 960 F.2d 1002, 1011-12 (11th Cir.1992); *Baytree of Inverrary Realty Partners v. City of Lauderhill*, 873 F.2d 1407, 1409 (11th Cir.1989); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1193-94 (5th Cir. Unit A May 1981), *cert. denied*, 455 U.S. 907, 102 S.Ct. 1251, 71 L.Ed.2d 444 (1982). However, not all actions taken by local legislators are subject to absolute immunity. In determining which actions of local legislators are protected by the doctrine of absolute legislative immunity, this Court has drawn the line between legislative actions and administrative actions: "Absolute legislative immunity 'extends only to actions taken within the sphere of legitimate legislative activity.' " *Brown*, 960 F.2d at 1011 (quoting *Finch v. City of Vernon*, 877 F.2d 1497, 1505 (11th Cir.1989)). We have held that actions taken in connection with promulgating zoning ordinances and classifications, even the decision about which zoning classification should be applied to a specific parcel of land, are legislative actions for which local legislators are absolutely immune. *Baytree*, 873 F.2d at 1409 (collecting cases). We have also held that actions taken in connection with the enactment of general moratoriums on development permits are subject to legislative immunity as well. *Brown*, 906 F.2d at 1012. Therefore, the City Council members are absolutely immune from Corn's remaining claim, insofar as that claim attempts to impose liability because of any actions the Council members took in connection with the

rezoning and construction moratorium ordinances. The same is not true concerning their actions relating to denial of the site plan.

This Court has held that a land use decision by local legislators which is an "application of policy to a specific party" is not protected by legislative immunity. *Crymes v. DeKalb County*, 923 F.2d 1482, 1486 (11th Cir.1991). In *Crymes*, we held that county commissioners who had denied approval for a development permit were not protected by legislative immunity because the decision to deny that permit involved the application of a general policy to a specific party under specific facts. *Id.* at 1485. The actions of the county commissioners in denying approval of Crymes' development permit are impossible to distinguish, insofar as legislative immunity is concerned, from the actions of the City Council members in denying approval of Corn's site plan. The *Crymes* decision thus mandates a holding that the City Council members in this case are not absolutely immune from suit for their actions in connection with the rejection of Corn's site plan. For the reasons we have stated before, they are, however, entitled to absolute legislative immunity for their actions in connection with the three ordinances.

Before he can reach the merits of the just compensation claim against the City Council members, as distinguished from the City, Corn still has another substantial burden to overcome: the doctrine of qualified immunity. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); *accord Rich v. Dollar*, 841 F.2d 1558, 1563 (11th Cir.1988). In order to overcome the

City Council members' qualified immunity defense, Corn will have to carry the burden of proving that their denial of his site plan violated federal law that was clearly established when that action was taken on July 12, 1977. *Davis v. Scherer*, 468 U.S. 183, 197, 104 S.Ct. 3012, 3020-21, 82 L.Ed.2d 139 (1984). Because the district court has not had an opportunity to address that issue, we leave it to be determined on remand.

V. CONCLUSION

The parties have been litigating over the use of 8.5 acres of land for sixteen years. We hope that this litigation, which has outlasted the plans to develop the land is nearing an end. What began as four claims has been whittled over the years to one, a just compensation claim, and it is by no means certain that that one claim will survive the remand.[3] Regardless of the outcome, it is in the best interests of all concerned that the outcome be reached sooner rather than later. Toward that end, the district court may wish to consider whether the remaining claim can be adjudicated on the basis of the evidentiary record that already exists. The district court is in the best position to decide that in its sound discretion.

We REVERSE the district court's holding that the City violated Corn's substantive due process rights. We also REVERSE its holding that the City Council members are entitled to absolute legislative immunity, insofar

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[3] We leave it to the district court to determine the effect on the just compensation claim of its October 7, 1991 order in response to Corn's motion to amend the judgment, where the court concluded that, "as to the front portion of the Property, '[o]n July 4, 1978, CORN regained all his sticks in the "bundle of rights commonly characterized as property." ' ... This determination necessarily means that the CITY had not 'gone too far' or taken CORN's property, thus requiring just compensation."

as their actions involving denial of the site plan are concerned, but we AFFIRM its holding that they are entitled to absolute legislative immunity insofar as their actions involving adoption of the ordinances are concerned. We REMAND the case to the district court for further proceedings on the just compensation claim.

HATCHETT, Circuit Judge, concurring specially.

I concur in the majority opinion, but write separately to emphasize that nothing in the opinion should be interpreted as creating a new rule of law that developers will always be unsuccessful in stating a substantive due process claim when a large number of citizens oppose a land use proposal. This is not a case where city council members voted on a zoning proposal after merely counting the number of citizens who opposed the proposal without any consideration of the merits of the proposal. To the contrary, we expressly recognize that "the district court properly rejected the argument that if the City Council blindly followed the will of its constituents who opposed the mini-warehouse project, its action was automatically valid." Majority op. at p. 1387 (citing *Corn v. City of Lauderdale Lakes*, 771 F.Supp. 1557, 1569 (S.D.Fla.1991)).

Our reversal of the district court's ruling that the city acted arbitrarily and capriciously, is based on the particular facts of this case which are set forth in considerable detail. After reviewing the evidence under the controlling principles articulated in *Greenbriar v. City of Alabaster*, we are convinced that the city council members in this case did evaluate the "merits" of Corn's site plan in addition to the legitimate general welfare concerns of their constituents. *See Greenbriar v. City of Alabaster*, 881 F.2d 1570, 1579 (11th Cir.1989) (holding that "Council members who evaluate a proposal in light of their constituents' preferences do not necessarily

overlook what [a substantive due process plaintiff] contends to be the 'merits' of a particular zoning plan."). This is not the case where city council members rejected a land use proposal following one or more orchestrated public hearings where a large number of citizens showed up and mouthed the magic words "noise," "traffic," "congestion," "safety," "aesthetics," "valuation of adjoining land," and "effect on city services." Instead, the record reflects that city council members voted to deny Corn's site plan after finding a rational basis for the general welfare concerns that citizens expressed during the public meetings. *See Greenbriar*, 881 F.2d at 1579-80 (concluding that a developer failed to show that city council members acted irrationally or arbitrarily in rejecting a land use plan, where council members undertook their own evaluation of the proposal and the record indicated a rational basis for citizens' concerns about the effect on surrounding neighborhoods and for their concerns about traffic problems). Moreover, as in *Greenbriar*, we find no indication that the city council members' attention to citizens' concerns in evaluating Corn's site plan deprived their decision of a rational basis. *See Greenbriar*, 881 F.2d at 1579.

Therefore, even though we do not hold that local governments will always prevail in defending substantive due process claims whenever their zoning decision follows public meetings where citizens express general welfare concerns, we conclude that in this case the city's denial of Corn's land use proposal was not arbitrary and capricious because the record reflects a rational basis for the expressed general welfare concerns.

D-59

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-6011

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
OCT 14 1993
MIGUEL J. CORTEZ
CLERK

HERMAN CORN,
Plaintiff-Appellant, Cross-Appellee,
versus
CITY OF LAUDERDALE LAKES,
Defendant-Appellee, Cross-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION FOR HEARING EN BANC

Before: HATCHETT, DUBINA and CARNES, Circuit Judges.

PER CURIAM:

(√) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rue 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Ed Carnes
United States Circuit Judge

APPENDIX E

UNITED STATES DISTRICT COURT,
S.D. FLORIDA.
No. 84-6034-CIV.

Herman CORN, Trustee, Plaintiff,
v.
CITY OF LUADERDALE LAKES,
et al., Defendants.

Aug. 30, 1991.
(771 F.Supp. 1557 (S.D.Fla. 1991))

FINDINGS OF FACT AND CONCLUSIONS OF LAW

PAINE, District Judge.

This matter comes before the Court following a four-day non-jury trial held August 12-15, 1991.

I. Findings of Fact

Background

1. Prior to June 1966, Plaintiff, HERMAN CORN, TRUSTEE ("CORN"), acquired 261 acres of real property located in the unincorporated area of Broward County and then zoned for agricultural uses (the "Parcel").

2. After preliminary negotiations with Defendant CITY OF LAUDERDALE LAKES (the "CITY") concerning possible annexation of the Parcel, CORN presented a proposed development plan.

3. On July 12, 1966, the CITY adopted three ordinances:

a. Ordinance 103 created a C-1A zoning category within the CITY, incorporating the permissible uses of the pre-existing category C-1 and requiring the submission of a site development plan before issuance of a building permit;

b. Ordinance 104 formally annexed the Parcel; and

c. Ordinance 105 designated various zoning classifications for different portions of the Parcel, including a C-1A designation for an approximately 8 1/2 acre portion bounded to the south by Canal C-13 and to the east by U.S. 441 (the "Property"). The land immediately north and west of the Property was concurrently zoned for residential use.

4. The uses permitted in zoning category C-1 included fertilizer sales, animal boarding kennel, automobile paint shop, storage warehouse, railroad freight or passenger station, and sheet metal shop.

5. Between 1966 and 1977, CORN developed much of the Parcel in accordance with the plan originally submitted to the CITY. As part of this development, CORN constructed waterways along the north and west boundaries of the Property, to form a buffer between it and adjacent residential areas.

6. CORN spent in excess of $100,000.00 preparing the Property to be developed, although it is not clear whether this money was directed toward general commercial preparation or a specific intended use.

7. During 1975, the CITY retained the services of a land use planner, who questioned the propriety of C-1A zoning for the Property. No formal action, however, was taken with respect to changing the zoning classification of the Property until July 12, 1977.

8. On April 1, 1977, CORN submitted a preliminary site plan (the "Site Plan") for development of the Property. The site plan depicted the construction of an

approximately 67,000 square foot shopping center on the eastern portion of the Property, which would front U.S. 441, and an approximately 103,000 square foot mini-warehouse on the western, or rear, portion.

9. Many CITY residents publicly opposed the CORN project.

10. On May 12, 1977, the CITY's Planning and Zoning Board recommended approval of the Site Plan to the City Council, the body authorized to make a final decision thereon. At the request of the City Council, the Planning and Zoning Board again considered the Site Plan at a public meeting held May 26, 1977. By letter dated May 27, 1977, the Planning and Zoning Board re-affirmed its May 12 recommendation of approval.

11. At public meetings held May 31, June 14, and June 21, 1977, the City Council tabled consideration of the Site Plan.

12. On July 12, 1977, the City council for the first time discussed changes in both the uses permitted within C-1A property and the zoning classification of CORN's Property. The City Council in fact passed two ordinances on first reading that were ultimately adopted:

a. Ordinance 548 amended Article XXXVII, Section 37.2 of the Broward County Zoning Classification Restrictions and Regulations, as adopted by reference, to eliminate storage warehouses as a permitted use in category C-1, and consequently category C-1A; and

b. Ordinance 549 rezoned the Property from C-1A to B-3, a more restrictive category.

13. After passing Ordinances 548 and 549, the City Council voted unanimously to deny approval of CORN's Site Plan. There was no discussion of what modifications would make the plan acceptable.

14. Ordinance 552, which imposed a 150-day building moratorium on all C-1 property in the CITY, was

proposed at the July 12, 1977 meeting and later adopted. The stated purpose of the moratorium was to permit the Planning and Zoning Board, which had purportedly advised that C-1 property abutting residential property should be rezoned, to review the CITY's commercial zoning scheme.

15. Prior to July 12, 1977, the City Council made no attempt to investigate mini-warehouses or compare the traffic, noise, and other adverse effects allegedly created by mini-warehouses with those created by any other type of use still permitted under zoning category C-1, as amended, or category B-3. Its actions were, instead, motivated by a desire to thwart CORN'S proposed project.

16. CORN sued these same Defendants in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, Case No. 77-12955 (the "State Court Action"), seeking, *inter alia*, a writ of mandamus directing the City Council to approve the Site Plan, a judicial declaration that Ordinances 548, 549, and 552 were invalid, and monetary damages for inverse condemnation. Upon a defense motion, the inverse condemnation claim was voluntarily dismissed.

17. Ordinance 568 extended the building moratorium through July 4, 1978.

18. On October 20, 1978, following a three-day non-jury trial, Circuit Judge Frank A. Orlando entered Final Judgment, concluding that CORN's conduct in reliance upon the C-1A status of his Property since 1960 created vested rights, which the CITY was equitably estopped to deny. Judge Orlando therefore declared Ordinances 548, 549, and 552 void and unenforceable against CORN or the Property, and directed the CITY to approve the Site Plan, then issue a building permit, upon correction of three technical deficiences.

19. The Final Judgment was stayed pending appeal to the Fourth District Court of Appeal.

20. A dispute arose regarding the need for, and proper amount of, a supersedeas bond on appeal. CORN submitted a pleading entitled "Damage Summary" that stated "[w]e have a commitment from Coral Gables Federal Saving & Loan Assn. to borrow 80% of total costs at 10.5211% interest for 24 years," then projected his potential damages as including increased loan costs and increased closing costs.

21. A seventy-five percent (75%) loan-to-value ratio, leaving the owner with twenty-five percent (25%) equity, was customary in the banking industry for construction loans in 1977.

22. On February 16, 1983, in *City of Lauderdale Lakes v. Corn*, 427 So.2d 239 (Fla. 4th Dist.Ct.App. 1983) ("*Corn I*"), the Fourth District Court of Appeal upheld the trial court's application of the doctrine of equitable estoppel and the propriety of mandamus, thereby affirming the Final Judgment. The appellate court issued a mandate on March 4, 1983, at which time its opinion became final.

23. During October 1983, seven months after the appellate mandate, CORN submitted a revised site plan (the "Revised Site Plan") to the CITY for approval. No explanation was offered for the seven-month delay.

24. The City Council refused to approve the Revised Site Plan unless CORN platted the Property, citing a Broward County platting requirement imposed after July 1977.

25. On January 17, 1984, CORN filed the instant action (the "Federal Court Action"), seeking damages

under 42 U.S.C. § 1983[1] for violation of civil rights granted under the takings clause of the Fifth Amendment,[2] the due process clause of the Fourteenth Amendment,[3] and the equal protection clause of the Fourteenth Amendment.

26. Among the items of damage specified in each Count of the Complaint were "increased financing and interest charges as a result of the delay in construction" of the project.

27. On October 26, 1984, a full year after submitting the Revised Site Plan, CORN filed a Motion to Enforce Final Judgment in the State Court Action, asserting that, because the CITY should have approved the Site Plan as submitted in 1977, the subsequent platting requirement did not apply. Again, CORN offered no explanation for the one-year delay.

28. On March 26, 1985, Judge Estella M. Moriarty, the successor to Judge Orlando's division, entered an Order on Plaintiff's Motion to Enforce Final Judgment, concluding that CORN was entitled to issuance of a building permit without platting the Property.

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1 42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of [state law], subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

2 "[P]rivate property [shall not] be taken for public use, without just compensation." U.S. Const. amend V.

3 "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV.

29. CORN chose, however, not to pursue development of the Property.

30. On October 22, 1985, United States District Judge Jose A. Gonzalez, Jr. dismissed this Federal Court Action as not ripe under *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). In *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir.1987) (*"Corn II"*), the Eleventh Circuit Court of Appeals reversed the dismissal.

31. The undersigned later held that CORN's cause of action was not barred by the statute of limitations or res judicata. In *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir.1990) (*"Corn III"*), the Eleventh Circuit affirmed this holding.

32. CORN remains the owner of the Property, which has not been developed.

33. CORN dismissed BEN EIGNER as a Defendant prior to the instant trial.

34. CORN likewise dismissed Counts III and IV, proceeding to trial on Counts I (a takings claim) and II (a substantive due process claim).

Wheeler IV Factors

The parties acknowledged, and the Court ruled (DE 196), that any damages for a temporary regulatory taking of property must be awarded in accordance with *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347 (11th Cir.1990) (*"Wheeler IV"*). As discussed *infra*, *Wheeler IV* requires the Court to determine (i) the fair market value of the subject property under various circumstances, (ii) the landowner's equity in a proposed project, (iii) the length of the temporary taking, and (iv) the market rate of return during this period.

35. Ronald Ames, an expert retained by CORN, valued the Property as developed and as restricted on nine separate valuation dates. The parties have stipulated that the values for the Property *as developed* are correct for purposes of this litigation. The CITY objects, however, to the methodology used to value the Property as restricted. Specifically, Mr. Ames assigned values to both the front and rear portions of the Property based upon a direct sales comparison approach, then adjusted these values downward. Between 1977 and 1983, Mr. Ames reduced the value by one-half (1/2) due to a perceived atmosphere of hostility toward development within the CITY that grew from the July 12, 1977 ordinances and an alleged incident involving property owned by J.C. Penney. From 1983 to 1985, Mr. Ames reduced the value by one-third (1/3) due primarily to the assumption that the project intended in 1977 was no longer feasible.

The Court finds that the *unadjusted* figures more accurately represent the fair market values of the Property as restricted, particularly between 1977 and 1983. While any appraisal necessarily includes some degree of speculation, Mr. Ames' fifty percent (50%) reduction based upon "hostility" to development crosses the line into sheer guesswork. Moreover, *Wheeler IV* does not authorize a reduction in the value of restricted land for public perceptions that may have been created by passing the subsequently invalidated ordinance. The raw direct sales comparison figures, absent Mr. Ames' speculation, are the most credible evidence of value in the record.

Mr. Ames valued the Property as of July 12, 1977, when the Site Plan was rejected, July 1 of each year from 1978 though 1984, and March 26, 1985, when the Order on Plaintiff's Motion to Enforce Final Judgment was entered. No valuations were made for July 4, 1978,

when the moratorium expired, or March 4, 1983, when the Fourth District Court of Appeals affirmed the Final Judgment by mandate. From the evidence presented, the Court finds that the values on these dates had not changed from Mr. Ames' last preceding valuation date.

In summary, the Court finds the fair market values of the Property to be as follows:

Date	Value-WH	Value-SC	Value-Raw	Value-Bck
7-12-77	$2,020,000	$2,600,000	$860,000	$253,000
7-1-78	2,070,000	2,750,000	860,000	253,000
7-4-78	2,070,000	2,750,000	860,000	253,000
7-1-79	2,210,000	2,850,000	1,360,000	425,000
7-1-80	2,320,000	2,900,000	1,360,000	425,000
7-1-81	2,570,000	2,950,000	1,360,000	425,000
7-1-82	2,750,000	3,100,000	1,360,000	425,000
3-4-83	2,750,000	3,100,000	1,360,000	425,000
7-1-83	2,750,000	3,150,000	1,850,000	916,000
7-1-84	2,810,000	3,150,000	1,850,000	916,000
3-26-85	2,850,000	2,800,000	2,220,000	1,287,000

Value-WH = value of that portion of the Property upon which CORN intended to build a mini-warehouse facility if the project were complete

Value-SC = value of portion upon which CORN intended to build a shopping center if complete

Value-Raw = value of total Property as restricted

Value-Bck = value of back portion as restricted

36. As indicated during trial, the Court interprets *Wheeler IV* as requiring a fact-specific determination of the landowner's equity, rather than a reflexive application of the industry standard, whenever possible. Herman Corn and Stephen Corn testified that CORN intended to build the mini-warehouse and shopping center entirely for cash. The Court rejects this testimony as not credible, particularly in light of the Damage Summary filed in the State Court Action and the Complaint herein, each of which refers to financing. In the absence of any evidence regarding the construction costs of the proposed project or a specific loan-to-value ratio contemplated by CORN, the Court will apply the customary seventy-five percent (75%) loan-to-value ratio.

37. The parties presented conflicting, and somewhat complex, testimony as to the appropriate rates of return during the applicable timeframe. The Court finds the testimony of H.J. Alexandrowicz most persuasive, and will employ the rates of return that he determined between 1977 and 1983. For the remaining two years, which Mr. Alexandrowicz did not address, the interest rate for 90-day Treasury Bills ("T-Bills") will be used. Thus, the market rates of return were as follows:

Date	Rate of Return
7-12-77	8.88%
7-1-78	8.88%
7-4-78	8.88%
7-1-79	9.12%
7-1-80	9.13%
7-1-81	9.47%
7-1-82	9.08%
3-4-83	9.08%
7-1-83	8.50%
7-1-84	9.60%
3-26-85	7.50%

38. Prejudgment interest at the rate paid on 90-day T-Bills, compounded annually, is properly added to any damages awarded herein. *See Front Royal and Warren County Industrial Park Corp. v. Town of Front Royal*, 749 F.Supp. 1439, 1448 & n. 14 (W.D.Va.1990). The T-Bill rates between 1977 and 19991 were as follows:

Date	Rate
1977	5.30%
1978	7.20%
1979	10.00%
1980	11.50%
1981	14.10%
1982	10.70%
1983	8.50%
1984	9.60%
1985	7.50%
1986	6.00%
1987	5.80%
1988	6.70%
1989	8.80%
1990	8.10%
1991	6.14%

II. Conclusions of Law

Liability

a. Individual Defendants

Neither the Pretrial Stipulation (DE 149), Plaintiff's Trial Memorandum, nor his proposed Findings of Fact and Conclusions of Law makes any mention of the individual Defendants' liability for damage under 42 U.S.C. § 1983. The issue was likewise ignored during trial. CORN has apparently abandoned this portion of the claim. Alternatively, CORN has failed to meet his burdens of production and proof in this regard. Judgment will be entered in favor of Defendants HOWARD CRAFT, ALFONSO GEREFFI, JEROME J. COHAN, MORRIS KLEIN, LYMAN L. ALLEN, LOUIS GREENWALD, and HARRY KAUFMAN.

b. The CITY

A taking may be physical, where a public entity enters upon private land, or regulatory, where a public ordinance invalidly restricts the landowner's private uses. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 329-30, 107 S.Ct. 2378, 2393-94, 96 L.Ed.2d 250 (1987) (Stevens, J., dissenting). There are four distinct types of constitutional challenges to zoning ordinances. A plaintiff may assert that the regulation:

1. has taken his property without just compensation in contravention of the Fifth Amendment (a

"just compensation" claim);[4]

2. goes so far and destroys the value of his property to such an extent that it has the same effect as a taking by eminent domain (a "due process takings" claim);

3. is arbitrary and capricious, bearing no substantial relation to the public health, safety, morals, or general welfare, and is therefore an invalid exercise of the police power (an "arbitrary and capricious due process" or "substantive due process" claim); or

4. denies equal protection (an "equal protection" claim).

Eide v. Sarasota County, 908 F.2d 716, 720-22 (11th Cir.1990). CORN has raised a just compensation claim[5] and a substantive due process claim.[6] The Court will first consider substantive due process, which CORN has termed his "main claim."

A violation of substantive due process under 42 U.S.C. § 1983 requires proof that (i) the plaintiff has been deprived of a federal constitutionally protected interest, and (ii) the deprivation resulted from an abuse of governmental power sufficient to raise an ordinary tort to the stature of a constitutional violation. *Rymer v.*

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[4] The takings clause applies to states and their political subdivisions through the Fourteenth Amendment. *See Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 270 n. 3 (11th Cir.1987) (citing *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897)).

[5] CORN, citing *Eide*, 908 F.2d at 721 n. 8, suggests that the just compensation and due process takings claims are best viewed as identical. *See* Plaintiff's Trial Memorandum at 16 n. 5.

[6] Curiously, one Eleventh Circuit Court of Appeals decision has stated that "[t]he plaintiff in *Corn* presented only a takings claim, and not a substantive due process claim." *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1574 n. 8 (11th Cir.1989).

Douglas County, 764 F.2d 796, 801 (11th Cir.1985). A substantive due process claim, unlike a just compensation claim, does not require denial of *all* reasonable use of the property; it is sufficient that the government has arbitrarily interfered with the owner's right to a particular use. *See, e.g., Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1576 n. 11 (11th Cir.1989).

i. *Deprivation of Property Interest*

The State Court Action established that CORN had acquired vested rights in the zoning that existed before July 12, 1977. This issue, having been presented, fully litigated, and resolved in a prior suit between these parties, cannot be relitigated. *Krug v. Meros*, 468 So.2d 299, 302 (Fla. 2d Dist.Ct.App.), *review denied*, 480 So.2d 1295 (Fla.1985); *see also Allen v. McCurry*, 449 U.S. 90, 96, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980) (collateral estoppel in § 1983 claim determined by state law).[7]

The question becomes whether CORN's vested rights rise to the level of a constitutionally protected property interest. State law creates and defines the parameters of a plaintiff's property interests. *Paul v. Davis*, 424 U.S. 693, 709, 96 S.Ct. 1155, 1164, 47 L.Ed.2d 405 (1976); *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972) "Mere abstract need or desire for a benefit will not create a protectible property interest; instead there must be a *legitimate claim of entitlement* to the expected benefit." *Spence v. Zimmerman*, 873 F.2d 256, 258 (11th Cir.1989) (citing *Roth*, 408 U.S. at 577, 92 S.Ct. at 2709) (emphasis added).

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[7] Additionally, CORN presented sufficient evidence at trial of its vested rights in the prior zoning.

The CITY, citing both *Marine One, Inc. v. Manatee County*, 877 F.2d 892, 894 (11th Cir.1989) ("*Marine One I*"), and *Mackenzie v. City of Rockledge*, 920 F.2d 1554, 1559 (11th Cir.1991), argues that Florida law grants no property right in the possession of a building permit, nor, therefore, approval of preliminary site plans. Defendants' Trial Brief at 9. Because this line of cases is inconsistent with Eleventh Circuit precedent and has been impliedly renounced, the argument is rejected.

In *Marine One I*, a landowner sued a county and its board of commissioners, alleging that the county's rescission of permits authorizing construction of a marina deprived it of property without compensation. The Eleventh Circuit Court of Appeals affirmed a judgment for the defendants notwithstanding a jury verdict, finding no constitutionally protected property interest. 877 F.2d at 894. Citing a number of Florida state cases decided in the 1970's, the court wrote:

> These cases make clear that Florida law does not provide the ability to recover money damages for rescission of a permit. *Cf. Corn v. City of Lauderdale Lakes*, 816 F.2d 1514, 1517 (11th Cir.1987) (under Florida law, exclusive remedy available to property owner challenging zoning ordinance was suit to invalidate the zoning ordinance and enjoin its enforcement). *The only right provided a permit holder under state law, then, is the right to retain the permit and invalidate any rescinding resolution once he has satisfied the requirements of equitable estoppel.* Thus, the district court correctly stated that if [plaintiff] acquired any right at all as a result of his reliance, it was a right to pursue equitable estoppel under proper circumstances.

> Because [plaintiff] had this remedy available to him, if the facts would indeed support the claim, the State did not deprive him of any protectable property interest. Having failed to prove the existence of a cognizable property interest, *the claims* of both [plaintiff and his company] *must fail as a matter of law.*

877 F.2d at 895 (emphasis added).

This language suggests that, if a state does not recognize a common law action for inverse condemnation, then a landowner has no property interest for purposes of 42 U.S.C. § 1983. The landowner would therefore lack *any* opportunity to recover monetary damages, an anomalous result that is inconsistent with Supreme Court teachings. *See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 319, 107 S.Ct. 2378, 2388, 96 L.Ed.2d 250 (1987) (where government's action has worked a taking, subsequent invalidation of action does not relieve it of duty to provide compensation for period of taking).[8] Certainly, *Corn II* did not hold that a landowner has no damage action for takings effected by invalid zoning ordinances passed in Florida.[9] The court therein simply noted that, under the *Williamson County* ripeness test,[10] a Florida

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[8] Conversely the availability of a state inverse condemnation claim renders any federal claim premature. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 196-97, 105 S.Ct. 3108, 3121-22, 87 L.Ed.2d 126 (1985). Section 1983 would then have little application to takings law.

[9] Had it done so, both *Corn III* and this trial would have been unnecessary.

[10] In *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 193, 196-97, 105 S.Ct. 3108, 3120, 3121-22, 87 L.Ed.2d 126 (1985), the Supreme Court held that a 42 U.S.C. § 1983 claim for money damages stemming from a regulatory taking is not ripe until the plaintiff demonstrates that (i) a final decision has been

(continued)

plaintiff was not required to seek damages in state court before filing a federal lawsuit.[11]

More importantly, as argued in a motion for rehearing, the *Marine One I* court overlooked its own recent precedent. In *A.A. Profiles, Inc. v. City of Fort Lauderdale*, 850 F.2d 1483 (11th Cir.1988), a landowner obtained a building permit for construction of a wood-chipping business after the city commission approved the use by resolution. During construction, the city rezoned the subject parcel to prevent wood-chipping. In an opinion issued just eleven months before *Marine One I*, the Eleventh Circuit held that the landowner had acquired property rights in its proposed development. 850 F.2d at 1488 (citing *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. Unit B 1981) ("*Wheeler I*")[12]). "The rezoning ordinance denied appellant this property interest because the new classification did not accommodate a development like the wood-chipping operation." 850 F.2d at 1488.[13]

(fn. continued)
made applying the regulation to the subject property, and (ii) there is no adequate state remedy, such as inverse condemnation, available to redress the injury occasioned by the final decision. *See Corn II*, 816 F.2d at 1515-16.

[11] State inverse condemnation proceedings are now apparently available in Florda. *See Executive 100, Inc. [v.] Martin County*, 922 F.2d 1536, 1539 (11th Cir.1991) (citing *Joint Ventures, Inc. v. Dept. of Transp.*, 563 So.2d 622, 628 (Fla.1990). This subsequent development has no bearing on the ripeness determination in *Corn II*.

[12] Decisions rendered by a Unit B panel of the former Fifth Circuit are binding precedent in the Eleventh Circuit. *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir.1982).

[13] The Eleventh Circuit, in another pre-*Marine One I* case involving a Florida landowner, held that

> state law creates a constitutionally protectible property interest in a building permit if (1) the municipality lacks discretion and must issue a building permit to an

(continued)

On rehearing, the *Marine One I* court stated a new basis for its holding:

> There is one salient feature of the instant case, however, that distinguishes it from the three cases that petitioners cite [*Wheeler I, A.A. Profiles*, and *Corn II*]. In each of those cases, a city's application of its zoning laws to owner or *private* property was determined to constitute a taking of that property;[14] here the land upon which construction was to be permitted is *publicly-owned*. The state owns the waters and the submerged lands upon which petitioners sought to build a dock.

898 F.2d 1490, 1492 (11th Cir.1990) ("*Marine One II*") (emphasis in original). The public/private distinction had not been mentioned in *Marine One I*. Thus "clarifying" its decision, the court denied the motion for rehearing. *Id.* at 1493.

In *Mackenzie*, 920 F.2d at 1559, a landowner sued a city, alleging that he was wrongfully denied a permit to build a marina. Citing *Marine One I*, but neither *A.A. Profiles* nor *Marine One II*, another Eleventh Circuit panel held that Florida law creates no property right in the application for or possession of a building permit.[15]

(fn. continued)

> applicant who complies with the statutory requirements *and* (2) the applicant has fulfilled the requirements.

Spence v. Zimmerman, 873 F.2d 256, 258 (11th Cir.1989) (citing *Littlefield v. City of Afton*, 785 F.2d 596, 602 (8th Cir.1989)) (emphasis in original). Thus, the arbitrary denial, as well as revocation, of a building permit might violate federal constitutional rights.

[14] Just as *Corn II* did not hold that the plaintiff lacked a damage action, neither did it determine that a taking had occurred; hence the instant trial.

[15] Because *Mackenzie* likewise involved a marina, the court could, and perhaps should, have grounded its decision in the public/private distinction raised in *Marine One II*.

In sum, *A.A. Profiles* held that a Florida landowner who obtains a building permit and spends money in reliance upon existing zoning has a constitutionally protected property interest in his proposed development. The *Marine One II* opinion essentially acknowledged the strength of this holding by shifting the entire foundation of the court's prior ruling. To the extent that *Mackenzie* relies upon *Marine One I*, it is inconsistent with *A.A. Profiles* and *Marine One II*.

CORN did not, of course, secure a building permit for his mini-warehouse project. But Judge Orlando held that the CITY lacked any discretion to deny preliminary site plan approval, the prerequisite to a building permit application. The Judge in fact ordered the CITY to issue a building permit in accordance with the final site plans. The Fourth District Court of Appeals affirmed the Final Judgment in full. *Corn I*, 427 So.2d at 242. CORN thus had no less a "legitimate claim of entitlement" to proceed with his development than one possessing a permit. *See Spence v. Zimmerman*, 873 F.2d at 258 (lack of discretion to deny is key).

ii. *Abuse of Governmental Power*

CORN must further prove that the CITY's actions in blocking development were arbitrary and capricious, lacking an adequate public purpose. *See Rymer*, 764 F.2d at 802 (landowner protected against arbitrary use of government power). CORN argues that collateral estoppel establishes this element as well, citing the following language from the Final Judgment:

> Further, no competent, substantial evidence was before this Court showing that these Ordinances were enacted as a result of compelling reasons or [of? — sic] public health and safety.

Collateral estoppel, however, applies only to "*necessary and material* issues resolved in the first suit." *Seaboard Coast Line R.R. Co. v. Cox*, 338 So.2d 190, 191 (Fla.1976) (emphasis added); *see generally* 32 Fla.Jur.2d *Judgments and Decrees* § 119 (1981) (collecting cases). The State Court Action concerned vested rights and equitable estoppel, which focus on the conduct of the landowner, not the governmental entity; the theory of vested rights overrides even a valid exercise of the zoning power. *See Town of Largo v. Imperial Homes Corp.*, 309 So.2d 571, 574 (Fla.2d Dist.Ct.App. 1975). Any discussion of the public health considerations underlying Ordinances 548, 549, and 552 appears to be mere dictum.

The party who claims the benefit of a former judgment bears the burden of showing its applicability. *Seaboard Coast Line R.R. Co. v. Industrial Contracting Co.*, 260 So.2d 860, 864 (Fla. 4th Dist.Ct.App.1972). Because CORN has not proven that the issue of public purpose was central to the Final Judgment, collateral estoppel does not apply.

Nonetheless, the Court, upon an independent review of the evidence, holds that the CITY acted arbitrarily and capriciously. The City Council expressed concern for increased traffic, noise, and other adverse effects allegedly created by mini-warehouses. Yet prior to July 12, 1977, no effort was made to investigate mini-warehouses. Moreover, the City Council targeted only the mini-warehouse use for elimination, leaving a number of uses that arguably cause more traffic, noise, and air pollution; no comparison between mini-warehouses and the remaining permitted uses was ever conducted. *See City of Kissimmee v. Ellis*, 431 So.2d 283, 285 (Fla. 5th Dist.Ct.App.1983) (city cannot prohibit proposed use that is no more obnoxious than permitted use). The moratorium seems nothing more than an attempt at *post*

hoc rationalization. *See 11126 Baltimore Boulevard v. Prince George's County*, 886 F.2d 1415, 1425 (4th Cir.1989) (supporting evidence must exist when decision made). In short, the City Council was motivated solely by an irrational desire to thwart CORN's plans.

The CITY takes the unusual position that, because the City Council exercised no independent judgment, but rather blindly followed the will of residents who opposed a mini-warehouse project, their actions are *per se* valid. *See* Defendants' Trial Brief at 11-12 (citing *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570 (11th Cir.1989)). Indeed, one district court has held that *Greenbriar*

> clearly stands for the proposition that elected officials who vote on zoning requests can act for purely political reasons, because partisan, political decisionmaking, even by unknowledgable, close-minded politicians fearful of harm more than political, is automatically deemed rational and, therefore, *cannot* be arbitrary and capricious unless it is the product of corruption . . . ."

Church of Jesus Christ of Latter-Day Saints v. Jefferson County, 721 F.Supp. 1212, 1214 (N.D.Ala.1989) (emphasis in original).

Greenbriar itself, however, merely stated that "[c]ouncil members who evaluate a proposal in light of their constituents' preferences do not *necessarily* overlook what [plaintiff] contends to be the 'merits' of a particular zoning plan," provided they "undertak[e] *their own evaluations* of the proposal." 881 F.2d at 1579-80 (emphasis added). Moreover, the appellate court in both *Wheeler I* and *A.A. Profiles* refused to accept public outcry against a project as evincing a legitimate state interest. 664 F.2d at 100; 850 F.2d at 1487-88. The

City Council herein undertook no independent evaluation of the merits and acted irrationally.

Because the Court finds the CITY liable for an arbitrary and capricious due process taking, it need not consider whether the ordinances "go too far" and entitle CORN to just compensation under the Fifth Amendment. "Regardless of which constitutional provision a taking falls under, the measure of damages to which the aggrieved landowner is entitled is the same." See *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 270 n. 3 (11th Cir.1987).[16]

Damages

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angles*, 482 U.S. 304, 319, 107 S.Ct. 2378, 2388, 96 L.Ed.2d 250 (1987), the Supreme Court recognized a constitutional *right* to damages for a temporary regulatory taking, but did not articulate the proper *measure* of damages. Defendants moved for partial summary judgment (DE 152), asking that damages be limited to "the rental value of the property for the period of the alleged taking" (DE 153), the measure ordinarily applied in temporary physical takings cases. *See, e.g., Kimball Laundry Co. v. United States*, 338 U.S. 1, 7, 69 S.Ct. 1434, 1438, 93 L.Ed. 1765 (1949); *Yuba Natural Resources, Inc. v. United States*, 904 F.2d 1577, 1581 (Fed.Cir.1990). This Court denied the motion on the basis of *Wheeler IV*, which, drawing upon the Eighth Circuit decision *Nemmers v. City of Dubuque*, 764 F.2d 502, 505 (8th Cir.1985), set forth a detailed, specific mathematical formula for temporary regulatory takings cases.

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[16] Query whether the Fifth Amendment even applies if the regulation does not serve a public purpose. *See id.*

In *Nemmers v. City of Dubuque*, 716 F.2d 1194 (8th Cir.1983), (*"Nemmers I"*), a landowner bought a tract of land that was later annexed by a city. Pending completion of the annexation, Nemmers invested in the development of a light industrial park upon the city's "receptiveness to industrial development of the [t]ract." But the annexed property was ultimately zoned agricultural, then residential. The Eighth Circuit Court of Appeals, reversing a district judge, held that Nemmers was due compensation for a taking of his vested rights in the planned industrial use. 716 F.2d at 1200. In a separate appeal regarding damages, the court awarded "the estimated value of the *difference in zoning*" between light industrial and residential. 764 F.2d 502, 505 (8th Cir.1985) (*"Nemmers II"*) (emphasis added).

In *Wheeler III*, the Eleventh Circuit Court of Appeals, citing *Nemmers II*, held that

> In the case of a temporary regulatory taking, the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit. The landowner's compensable interest, therefore, is the return on the portion of the fair market value that is lost as a result of the regulatory restriction. Accordingly, the landowner should be awarded the market rate return computed over the period of the temporary taking on the *difference between the property's fair market value without the regulatory restriction and its fair market value with the restriction.*

833 F.2d at 271 (emphasis added) (citations omitted).

On remand following *Wheeler III*, the district court found that the invalidated ordinance had not destroyed the highest and best use of the land. Because "the fair market value of the [subject] property was not

diminished by the enactment of [the ordinance]," the court awarded no damages. *See* 896 F.2d at 1350.

The Eleventh Circuit reversed. After reiterating the quoted language from *Wheeler III*, the court spelled out the damage formula for a temporary taking. "The property's fair market value without the regulatory restriction" was defined, however, as the value of "[t]he *complex* which appellants had the right to build," as if it were completed, and without regard to the cost of construction. *Wheeler IV*, 896 F.2d at 1351.[17] Yet no type of building was postulated in ascertaining the "fair market value with the restriction," even though other, and more profitable, uses remained.

This definitional inconsistency marks a departure from *Nemmers II*, and, accordingly, the theoretical underpinnings of *Wheeler III*. Moreover, it is simply unfair to award compensatory damages for "an injury to the property's potential for producing income," 896 F.2d at 1351, when the property could still be put to its highest and best use. *See Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1576 n. 11 (11th Cir.1989) ("[d]iscerning what alternative uses are permitted ... clearly is relevant in determining what damages result

[17] As CORN observed during trial, it is irrelevant under *Wheeler IV* whether the completed project, valued at $2,300,000.00, would have cost $6,000.00 or $6,000,000.00, even though this would clearly affect the landowner's profit.

from an arbitrary decision").[18] The *Wheeler IV* formula seems designed to discourage arbitrary governmental acts as much as make landowners whole. Perhaps the most equitable solution would be to order reimbursement of all money invested by a landowner for the intended use, and award additional damages only if the most profitable use was taken. In any event, the Court is compelled to apply *Wheeler IV* so long as it remains the law of this Circuit. *E.g., Fox v. Acadia State Bank*, 937 F.2d 1566, 1567 (11th Cir.1991); *United States v. DeFabritus*, 605 F.Supp. 1538, 1544 (S.D.N.Y.1985) (a district court cannot ignore binding precedent with which it may disagree).

The Court has made findings as to the fair market values of the Property, CORN's equity, the market rate of return, and the proper rate of prejudgment interest. Before conducting any mathematical calculations, the period, physical scope, and permanence of the regulatory taking must be clarified.

i. *Period of Taking*

There is little question that, under *Wheeler IV*, the temporary takings period began on July 12, 1977.[19]

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[18] *Wheeler IV* also makes no allowance for any use to which the landowner may have put the money that he intended to invest in the development. Conversely, by strictly limiting damages to his equity, the owner is denied any recovery for the "spread" that he might have earned between a lender's interest rate and the project's expected return. These many considerations illustrate that "the issue of what constitutes just compensation in this context is a particularly meaty one, which merits substantial reflection and analysis." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 363, 106 S.Ct. 2561, 2573, 91 L.Ed.2d 285 (1986) (White, J., dissenting).

[19] The CITY points out that, even if CORN had received preliminary site plan approval on July 12, 1977, he would not have obtained

(continued)

CORN asserts that it did not end until March 26, 1985, the date on which Judge Moriarty granted Plaintiff's Motion to Enforce Final Judgment. The Court disagrees. The Complaint in this action makes no claim for damages beyond March 4, 1983, when *Corn I* became final. More importantly, CORN did not file his Revised Site Plan until seven months after the appellate mandate, then did not move for enforcement of the Final Judgment for another year. No explanation was offered at trial for these lengthy delays. It would be patently unfair to reward CORN for his own delay.

II. *Physical Scope of Taking*

CORN seeks damages for the entire Property during the takings period, claiming that the Property was subject to a *de jure* or *de facto* moratorium through March 4, 1983. He quotes a footnote from *Corn II* as proof that the CITY has conceded, and the Eleventh Circuit has "conclusively determined," that "[t]here was no use to which Plaintiff could put the Property during this period":

> In its brief, the City has indicated that although the ordinances imposed a moratorium on development of Corn's land, the ban was a temporary one which arguably did not restrict all uses of all of Corn's property. However, at oral argument, in response to a direct question by the court as to whether Corn failed to pursue the variances available to him, counsel for the

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(fn. continued)
a permit and built the project for several months. However, *Wheeler IV* measured the takings period from the City's arbitrary withdrawal of a building permit. 896 F.2d at 1351-52. The practical delays associated with completing construction affected neither the beginning *nor end* of the regulatory taking. *See id.*

> City stated that "there is no question" that Corn could not have sought any additional variances in view of the City's ban on all building by him. . . .

816 F.2d at 1516 n. 3, *quoted in* Plaintiff's Trial Memorandum at 23.[20]

The quoted passage does not, as CORN suggests, delineate the timeframe during which the CITY banned all building by him; this Court agrees that a total ban lasted for nearly a full year. Moreover, as discussed *supra* at 1566-1567, *Corn II* was an appeal of Judge Gonzalez's order dismissing the Federal Court Action as not ripe under *Williamson County*. The appellate court was thus concerned with the finality of the City Council's July 12, 1977 actions, not the substantive merits of CORN's § 1983 claims. A footnoted reference regarding a procedural matter is hardly the proper foundation for the doctrine of law of the case. *See generally* 3 Fla. Jur.2d *Appellate Review* §§ 421-423 (1978) (collecting cases) (law of the case limited to rulings on questions of law actually presented on former appeal). Finally, even if the Eleventh Circuit intended to comment upon the merits, and this comment were not dictum, the undersigned would decline to apply the law of the case doctrine as inconsistent with the trial evidence and manifestly unjust. *See United States v. Robinson*, 690 F.2d 869, 872 (11th Cir.1982).

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[20] CORN cites language from a footnote in *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1576 n. 12 (11th Cir.1989) that in *Corn II* the court found "that the local authority had placed a complete moratorium on development." Inasmuch as the same opinion states that "[t]he plaintiff in *Corn* presented only a takings claim, and not a substantive due process claim," *see supra* at n. 6, it is unlikely that CORN truly wishes to adopt *Greenbriar's* recitation of facts.

The record establishes that after July 4, 1978, when the building moratorium expired by its own terms, there was no legal impediment to constructing any project that complied with the B-3 zoning classification, including the exact shopping center described in the Site Plan.[21] CORN's own expert, Ronald Ames, admitted that the mini-warehouse and shopping center are separate types of property that serve separate markets. CORN has suggested, but did not prove, that building a shopping center on the front portion of the Property would somehow "landlock" the rear portion; certainly the shopping center depicted in the Site Plan did not "landlock" the proposed mini-warehouse. In short, the shopping center could have been built, and assumedly would have generated the return that CORN now seeks from the CITY.

CORN quotes *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 130-31, 98 S.Ct. 2646, 2662-63, 57 L.Ed.2d 631 (1978) for the proposition that "[t]aking jurisprudence does not divide a single parcel into discrete segments," but rather focuses on "the parcel as a whole." Plaintiff's Trial Memorandum at 25.[22] The *Penn Central* court, however, was discussing laws limiting subsurface excavation and development of air rights, not adjacent, distinct portions of a 261-acre Parcel.

CORN has consistently stated that, under *A.A. Profiles* and *Wheeler I*, a landowner may acquire a constitutionally protected property interest in a single

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[21] CORN's argument that the CITY would likely have prevented *any* construction during pendency of the state appeal is both speculative and inconsistent with evidence that the mini-warehouse was the primary, if not sole, subject of dispute.

[22] CORN's argument, taken to its logical extreme, could obligate the CITY to pay damages under *Wheeler IV* for the entire 261-acre Parcel purchased in 1966.

intended use. For the front portion of the Property, however, a shopping center *was* CORN's intended use. On July 4, 1978, CORN regained all his sticks in the "bundle of rights commonly characterized as property." Plaintiff's Trial Memorandum at 15 (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831, 107 S.Ct. 3141, 3145, 97 L.Ed.2d 677 (1987)). There being no "taking" of the front portion beyond this date, the CITY is not obligated to pay damages therefor. *See Spence v. Zimmerman*, 873 F.2d 256, 259 (11th Cir.1989) (citing *Kerley Industries, Inc. v. Pima County*, 785 F.2d 1444 (9th Cir.1986) (no deprivation where landowner had right to use desired permit).[23]

iii. *Permanence of Taking*

Finally, CORN raises another argument mentioned nowhere in the operative pleadings: that due to the delays occasioned by the CITY's actions, his loss "has matured into a permanent taking." Plaintiff's Trial Memorandum at 47. Having forever "missed the market" for his mini-warehouse/shopping center project, CORN requests damages under *Wheeler IV* for the "lifetime" of the proposed development. *Id.* at 50.

It should again be noted that development of the shopping center was possible at any time after July 4, 1978. As to the mini-warehouse, the valuations rendered by Ronald Ames, which steadily increase from $2,020,000.00 in July 1977 to $2,850,000.00 in March 1985, bely the suggestion that the project was no longer feasible. And, as the CITY notes, neither *Wheeler IV* nor any reported case authorizes permanent damages for a temporary taking. Beyond their inherently speculative

[23] The Court's decision is better viewed as grounded in an absence of liability, and not, as CORN suggests, a duty to mitigate damages.

nature, such damages would not adequately "account[] for the fact that the owner still retains the property after the taking is invalidated. . . ." *Front Royal*, 749 F.Supp. at 1445.

The Court will therefore award damages for a regulatory taking of the entire Property between July 12, 1977 and July 4, 1978, and the rear portion of the Property between July 5, 1978 and March 4, 1983. Calculations will be made as to the damages suffered during each approximately one-year interval between valuation dates. Compounded interest, at the fluctuating T-Bill rates, will then be added for each year from the end of a given interval to the present. The sum of these intervals will be CORN's total award.

The individual calculations of damages and interest are detailed in the attached Appendix and summarized below:

Date Range	Damages	Damages + Int
7-12-77 to 7-4-78	$81,065.60	$241,077.65
7-5-78 to 6-30-79	39,934.03	110,613.47
7-1-79 to 6-30-80	40,698.00	107,361.57
7-1-80 to 6-30-81	43,253.38	102,334.23
7-1-81 to 6-30-82	50,782.88	100,211.91
7-1-82 to 3-4-83	35,888.70	66,276.19
TOTAL DAMAGES	$291,622.59	$727,875.02

In light of all the foregoing, it is hereby ORDERED and ADJUDGED as follows:

1. The Clerk of the Court is directed to enter Final Judgment (a) against CORN on his claims against the individual Defendants HOWARD CRAFT, MORRIS KLEIN, LYMAN L. ALLEN, ALFONSO GEREFFI, JEROME J. COHAN, LOUIS GREENWALD, and HARRY KAUFMAN, but (b) for CORN, in the amount of $727,875.02, on his claims against the CITY.

2. The Court reserves ruling as to any prevailing party's entitlement to, and the reasonable amount of, attorneys' fees under 42 U.S.C. § 1988.

3. Any party seeking an award of attorneys' fee shall file a proper motion, with supporting affidavits and a memorandum of law, within thirty (30) days hereof.

DONE and ORDERED.

APPENDIX

1. 7-12-77 to 7-4-78

a. Damages

FMV-without restriction	$4,620,000.00
(FMV-with restriction)	(860,000.00)
	3,760,000.00
X Equity	.25
	940,000.00
X Duration (in years)	.98
	921,200.00
X Rate of Return (in %)	8.88
DAMAGES	$ 81,065.60

b. Interest

-7-4-78 to 12-31-78

Damages plus accrued interest	$ 81,065.60
X T-Bill Rate (in %)	7.20
X Duration (in years)	.49
Interest During Calendar Year	2,846.40
NEW Damages plus accrued interest	$ 83,912.00

-1-1-79 to 12-31-79

Damages plus accrued interest	$ 83,078.47
X T-Bill Rate (in %)	10.00
X Duration (in years)	1.00
Interest During Calendar Year	8,307.85
NEW Damages plus accrued interest	$ 91,386.32

-1-1-80 to 12-31-80

Damages plus accrued interest	$ 91,386.32
X T-Bill Rate (in %)	11.50
X Duration (in years)	1.00
Interest During Calendar Year	10,509.43
NEW Damages plus accrued interest	$ 101,895.75

-1-1-81 to 12-31-81	
Damages plus accrued interest	$ 101,895.75
X T-Bill Rate (in %)	14.10
X Duration (in years)	1.00
Interest During Calendar Year	14,367.30
NEW Damages plus accrued interest	$ 116,263.05
-1-1-82 to 12-31-82	
Damages plus accrued interest	$ 116,263.05
X T-Bill Rate (in %)	10.70
X Duration (in years)	1.00
Interest During Calendar Year	12,440.15
NEW Damages plus accrued interest	$ 128,703.20
-1-1-83 to 12-31-83	
Damages plus accrued interest	$ 128,703.20
X T-Bill Rate (in %)	8.50
X Duration (in years)	1.00
Interest During Calendar Year	10,939.77
NEW Damages plus accrued interest	$ 139,642.97
-1-1-84 to 12-31-84	
Damages plus accrued interest	$ 139,642.97
X T-Bill Rate (in %)	9.60
X Duration (in years)	1.00
Interest During Calendar Year	13,405.73
NEW Damages plus accrued interest	$ 153,048.70
-1-1-85 to 12-31-85	
Damages plus accrued interest	$ 153,048.70
X T-Bill Rate (in %)	7.50
X Duration (in years)	1.00
Interest During Calendar Year	11,478.65
NEW Damages plus accrued interest	$ 164,527.35

-1-1-86 to 12-31-86	
Damages plus accrued interest	$ 164,527.35
X T-Bill Rate (in %)	6.00
X Duration (in years)	1.00
Interest During Calendar Year	9,871.64
NEW Damages plus accrued interest	$ 174,398.99
-1-1-87 to 12-31-87	
Damages plus accrued interest	$ 174,398.99
X T-Bill Rate (in %)	5.80
X Duration (in years)	1.00
Interest During Calendar Year	10,115.14
NEW Damages plus accrued interest	$ 184,514.13
-1-1-88 to 12-31-88	
Damages plus accrued interest	$ 184,514.13
X T-Bill Rate (in %)	6.70
X Duration (in years)	1.00
Interest During Calendar Year	12,362.45
NEW Damages plus accrued interest	$196,876.58
-1-1-89 to 12-31-89	
Damages plus accrued interest	$ 196,876.58
X T-Bill Rate (in %)	8.80
X Duration (in years)	1.00
Interest During Calendar Year	17,325.14
NEW Damages plus accrued interest	$ 214,201.72
-1-1-90 to 12-31-90	
Damages plus accrued interest	$ 214,201.72
X T-Bill Rate (in %)	8.10
X Duration (in years)	1.00
Interest During Calendar Year	17,350.34
NEW Damages plus accrued interest	$ 231,552.06

-1-1-91 to 8-30-91	
Damages plus accrued interest	$ 231,552.06
X T-Bill Rate (in %)	6.14
X Duration (in years)	.67
Interest During Calendar Year	9,525.59
NEW Damages plus accrued interest	$ 241,077.65

2. 7-5-78 to 6-30-79

a. Damages

FMV-without restriction	$2,070,000.00
(FMV-with restriction)	(253,000.00)
	1,817,000.00
X Equity	.25
	454,250.00
X Duration (in years)	.99
	449,707.50
X Rate of Return (in %)	8.88
DAMAGES	$ 39,934.03

b. Interest

-6-30-79 to 12-31-79	
Damages plus accrued interest	$ 39,934.03
X T-Bill Rate (in %)	10.00
X Duration (in years)	.50
Interest During Calendar Year	1,996.70
NEW Damages plus accrued interest	$ 41,930.73
-1-1-80 to 12-31-80	
Damages plus accrued interest	$ 41,930.73
X T-Bill Rate (in %)	11.50
X Duration (in years)	1.00
Interest During Calendar Year	4,822.03
NEW Damages plus accrued interest	$ 46,752.76

-1-1-81 to 12-31-81	
Damages plus accrued interest	$ 46,752.76
X T-Bill Rate (in %)	14.10
X Duration (in years)	1.00
Interest During Calendar Year	6,592.14
NEW Damages plus accrued interest	$ 53,344.90
-1-1-82 to 12-31-82	
Damages plus accrued interest	$ 53,344.90
X T-Bill Rate (in %)	10.70
X Duration (in years)	1.00
Interest During Calendar Year	5,707.90
NEW Damages plus accrued interest	$ 59,052.80
-1-1-83 to 12-31-83	
Damages plus accrued interest	$ 59,052.80
X T-Bill Rate (in %)	8.50
X Duration (in years)	1.00
Interest During Calendar Year	5,019.49
NEW Damages plus accrued interest	$ 64,072.29
-1-1-84 to 12-31-84	
Damages plus accrued interest	$ 64,072.29
X T-Bill Rate (in %)	9.60
X Duration (in years)	1.00
Interest During Calendar Year	6,150.94
NEW Damages plus accrued interest	$ 70,223.23
-1-1-85 to 12-31-85	
Damages plus accrued interest	$ 70,223.23
X T-Bill Rate (in %)	7.50
X Duration (in years)	1.00
Interest During Calendar Year	5,266.74
NEW Damages plus accrued interest	$ 75,489.97

-1-1-86 to 12-31-86	
Damages plus accrued interest	$ 75,489.97
X T-Bill Rate (in %)	6.00
X Duration (in years)	1.00
Interest During Calendar Year	4,529.40
NEW Damages plus accrued interest	$ 80,019.37
-1-1-87 to 12-31-87	
Damages plus accrued interest	$ 80,019.37
X T-Bill Rate (in %)	5.80
X Duration (in years)	1.00
Interest During Calendar Year	4,641.12
NEW Damages plus accrued interest	$ 84,660.49
-1-1-88 to 12-31-88	
Damages plus accrued interest	$ 84,660.49
X T-Bill Rate (in %)	6.70
X Duration (in years)	1.00
Interest During Calendar Year	5,672.25
NEW Damages plus accrued interest	$ 90,332.74
-1-1-89 to 12-31-89	
Damages plus accrued interest	$ 90,332.74
X T-Bill Rate (in %)	8.80
X Duration (in years)	1.00
Interest During Calendar Year	7,949.28
NEW Damages plus accrued interest	$ 98,282.02
-1-1-90 to 12-31-90	
Damages plus accrued interest	$98,282.02
X T-Bill Rate (in %)	8.10
X Duration (in years)	1.00
Interest During Calendar Year	7,906.84
NEW Damages plus accrued interest	$ 106,242.86

-1-1-91 to 8-30-91	
Damages plus accrued interest	$ 106,242.86
X T-Bill Rate (in %)	6.14
X Duration (in years)	.67
Interest During Calendar Year	4,370.62
NEW Damages plus accrued interest	$ 110,613.47

3. 7-1-79 to 6-30-80

a. Damages

FMV-without restriction	$2,210,000.00
(FMV-with restriction)	(425,000.00)
	1,785,000.00
X Equity	.25
	446,250.00
X Duration (in years)	1.00
	446,250.00
X Rate of Return (in %)	9.12
DAMAGES	$ 40,698.00

b. Interest

-6-30-80 to 12-31-80	
Damages plus accrued interest	$ 40,698.00
X T-Bill Rate (in %)	11.50
X Duration (in years)	0.50
Interest During Calendar Year	4,680.27
NEW Damages plus accrued interest	$ 45,378.27

-1-1-81 to 12-31-81	
Damages plus accrued interest	$45,378.27
X T-Bill Rate (in %)	14.10
X Duration (in years)	1.00
Interest During Calendar Year	6,398.34
NEW Damages plus accrued interest	$ 51,776.61

-1-1-82 to 12-31-82	
Damages plus accrued interest	$ 51,776.61
X T-Bill Rate (in %)	10.70
X Duration (in years)	1.00
Interest During Calendar Year	5,540.10
NEW Damages plus accrued interest	$ 57,316.71
-1-1-83 to 12-31-83	
Damages plus accrued interest	$ 57,316.71
X T-Bill Rate (in %)	8.50
X Duration (in years)	1.00
Interest During Calendar Year	4,871.92
NEW Damages plus accrued interest	$ 62,188.63
-1-1-84 to 12-31-84	
Damages plus accrued interest	$ 62,188.63
X T-Bill Rate (in %)	9.60
X Duration (in years)	1.00
Interest During Calendar Year	5,970.11
NEW Damages plus accrued interest	$ 68,158.74
-1-1-85 to 12-31-85	
Damages plus accrued interest	$ 68,158.74
X T-Bill Rate (in %)	7.50
X Duration (in years)	1.00
Interest During Calendar Year	5,111.91
NEW Damages plus accrued interest	$ 73,270.65
-1-1-86 to 12-31-86	
Damages plus accrued interest	$ 73,270.65
X T-Bill Rate (in %)	6.00
X Duration (in years)	1.00
Interest During Calendar Year	4,396.24
NEW Damages plus accrued interest	$ 77,666.89

-1-1-87 to 12-31-87	
Damages plus accrued interest	$ 77,666.89
X T-Bill Rate (in %)	5.80
X Duration (in years)	1.00
Interest During Calendar Year	4,504.68
NEW Damages plus accrued interest	$ 82,171.57
-1-1-88 to 12-31-88	
Damages plus accrued interest	$ 82,171.57
X T-Bill Rate (in %)	6.70
X Duration (in years)	1.00
Interest During Calendar Year	5,505.50
NEW Damages plus accrued interest	$ 87,677.07
-1-1-89 to 12-31-89	
Damages plus accrued interest	$ 87,677.07
X T-Bill Rate (in %)	8.80
X Duration (in years)	1.00
Interest During Calendar Year	7,715.58
NEW Damages plus accrued interest	$ 95,392.65
-1-1-90 to 12-31-90	
Damages plus accrued interest	$ 95,392.65
X T-Bill Rate (in %)	8.10
X Duration (in years)	1.00
Interest During Calendar Year	7,726.80
NEW Damages plus accrued interest	$ 103,119.45
-1-1-91 to 8-30-91	
Damages plus accrued interest	$ 103,119.45
X T-Bill Rate (in %)	6.14
X Duration (in years)	.67
Interest During Calendar Year	4,242.13
NEW Damages plus accrued interest	$ 107,361.57

4. 7-1-80 to 6-30-81

a. Damages

FMV-without restriction	$ 2,320,000.00
(FMV-with restriction)	(425,000.00)
	1,895,000.00
X Equity	.25
	473,750.00
X Duration (in years)	1.00
	473,750.00
X Rate of Return (in %)	9.13
DAMAGES	$ 43,253.38

b. Interest

-6-30-81 to 12-31-81	
Damages plus accrued interest	$ 43,253.38
X T-Bill Rate (in %)	14.10
X Duration (in years)	1.00
Interest During Calendar Year	6,098.73
NEW Damages plus accrued interest	$ 49,352.11
-1-1-82 to 12-31-82	
Damages plus accrued interest	$ 49,352.11
X T-Bill Rate (in %)	10.70
X Duration (in years)	1.00
Interest During Calendar Year	5,280.68
NEW Damages plus accrued interest	$ 54,632.79
-1-1-83 to 12-31-83	
Damages plus accrued interest	$ 54,632.79
X T-Bill Rate (in %)	8.50
X Duration (in years)	1.00
Interest During Calendar Year	4,643.79
NEW Damages plus accrued interest	$ 59,276.58

-1-1-84 to 12-31-84	
Damages plus accrued interest	$ 59,276.58
X T-Bill Rate (in %)	9.60
X Duration (in years)	1.00
Interest During Calendar Year	5,690.55
NEW Damages plus accrued interest	$ 64,967.13
-1-1-85 to 12-31-85	
Damages plus accrued interest	$ 64,967.13
X T-Bill Rate (in %)	7.50
X Duration (in years)	1.00
Interest During Calendar Year	4,872.54
NEW Damages plus accrued interest	$ 69,839.66
-1-1-86 to 12-31-86	
Damages plus accrued interest	$ 69,839.66
X T-Bill Rate (in %)	6.00
X Duration (in years)	1.00
Interest During Calendar Year	4,190.88
NEW Damages plus accrued interest	$ 74,030.04
-1-1-87 to 12-31-87	
Damages plus accrued interest	$ 74,030.04
X T-Bill Rate (in %)	5.80
X Duration (in years)	1.00
Interest During Calendar Year	4,293.74
NEW Damages plus accrued interest	$ 78,323.78
-1-1-88 to 12-31-88	
Damages plus accrued interest	$ 78,323.78
X T-Bill Rate (in %)	6.70
X Duration (in years)	1.00
Interest During Calendar Year	5,247.69
NEW Damages plus accrued interest	$ 83,571.47

-1-1-89 to 12-31-89	
Damages plus accrued interest	$ 83,571.47
X T-Bill Rate (in %)	8.80
X Duration (in years)	1.00
Interest During Calendar Year	7,354.29
NEW Damages plus accrued interest	$ 90,925.76
-1-1-90 to 12-31-90	
Damages plus accrued interest	$ 90,925.76
X T-Bill Rate (in %)	8.10
X Duration (in years)	1.00
Interest During Calendar Year	7,364.99
NEW Damages plus accrued interest	$ 98,290.75
-1-1-91 to 8-30-91	
Damages plus accrued interest	$ 98,290.75
X T-Bill Rate (in %)	6.14
X Duration (in years)	.67
Interest During Calendar Year	4,043.48
NEW Damages plus accrued interest	$ 102,334.23

5. 7-1-81 to 6-30-82

a. Damages

FMV-without restriction	$2,570,000.00
(FMV-with restriction)	(425,000.00)
	2,145,000.00
X Equity	.25
	536,250.00
X Duration (in years)	1.00
	536,250.00
X Rate of Return (in %)	9.47
DAMAGES	$ 50,782.88

b. Interest

-6-30-82 to 12-31-82	
Damages plus accrued interest	$ 50,782.88
X T-Bill Rate (in %)	10.70
X Duration (in years)	0.50
Interest During Calendar Year	2,716.88
NEW Damages plus accrued interest	$ 53,499.76
-1-1-83 to 12-31-83	
Damages plus accrued interest	$ 53,499.76
X T-Bill Rate (in %)	8.50
X Duration (in years)	1.00
Interest During Calendar Year	4,547.48
NEW Damages plus accrued interest	$ 58,047.24
-1-1-84 to 12-31-84	
Damages plus accrued interest	$ 58,047.24
X T-Bill Rate (in %)	9.60
X Duration (in years)	1.00
Interest During Calendar Year	5,572.53
NEW Damages plus accrued interest	$ 63,619.77
-1-1-85 to 12-31-85	
Damages plus accrued interest	$ 63,619.77
X T-Bill Rate (in %)	7.50
X Duration (in years)	1.00
Interest During Calendar Year	4,771.48
NEW Damages plus accrued interest	$ 68,391.25
-1-1-86 to 12-31-86	
Damages plus accrued interest	$ 68,391.25
X T-Bill Rate (in %)	6.00
X Duration (in years)	1.00
Interest During Calendar Year	4,103.48
NEW Damages plus accrued interest	$ 72,494.73

-1-1-87 to 12-31-87	
Damages plus accrued interest	$ 72,494.73
X T-Bill Rate (in %)	5.80
X Duration (in years)	1.00
Interest During Calendar Year	4,204.69
NEW Damages plus accrued interest	$ 76,699.42
-1-1-88 to 12-31-88	
Damages plus accrued interest	$ 76,699.42
X T-Bill Rate (in %)	6.70
X Duration (in years)	1.00
Interest During Calendar Year	5,138.86
NEW Damages plus accrued interest	$ 81,838.28
-1-1-89 to 12-31-89	
Damages plus accrued interest	$ 81,838.28
X T-Bill Rate (in %)	8.80
X Duration (in years)	1.00
Interest During Calendar Year	7,201.77
NEW Damages plus accrued interest	$ 89,040.05
-1-1-90 to 12-31-90	
Damages plus accrued interest	$ 89,040.05
X T-Bill Rate (in %)	8.10
X Duration (in years)	1.00
Interest During Calendar Year	7,212.24
NEW Damages plus accrued interest	$ 96,252.29
-1-1-91 to 8-30-91	
Damages plus accrued interest	$ 96,252.29
X T-Bill Rate (in %)	6.14
X Duration (in years)	.67
Interest During Calendar Year	3,959.63
NEW Damages plus accrued interest	$ 100,211.91

6. 7-1-82 to 3-4-83

a. Damages

FMV-without restriction	$2,750,000.00
(FMV-with restriction)	(425,000.00)
	2,325,000.00
X Equity	.25
	581,250.00
X Duration (in years)	.68
	395,250.00
X Rate of Return (in %)	9.08
DAMAGES	$ 35,888.70

b. Interest

-3-4-83 to 12-31-83	
Damages plus accrued interest	$ 35,888.70
X T-Bill Rate (in %)	8.50
X Duration (in years)	.82
Interest During Calendar Year	2,501.44
NEW Damages plus accrued interest	$ 38,390.14
-1-1-84 to 12-31-84	
Damages plus accrued interest	$ 38,390.14
X T-Bill Rate (in %)	9.60
X Duration (in years)	1.00
Interest During Calendar Year	3,685.45
NEW Damages plus accrued interest	$ 42,075.59
-1-1-85 to 12-31-85	
Damages plus accrued interest	$ 42,075.59
X T-Bill Rate (in %)	7.50
X Duration (in years)	1.00
Interest During Calendar Year	3,155.67
NEW Damages plus accrued interest	$ 45,231.26

-1-1-86 to 12-31-86	
Damages plus accrued interest	$ 45,231.26
X T-Bill Rate (in %)	6.00
X Duration (in years)	1.00
Interest During Calendar Year	2,713.88
NEW Damages plus accrued interest	$ 47,945.14
-1-1-87 to 12-31-87	
Damages plus accrued interest	$ 47,945.14
X T-Bill Rate (in %)	5.80
X Duration (in years)	1.00
Interest During Calendar Year	2,780.82
NEW Damages plus accrued interest	$ 50,725.96
-1-1-88 to 12-31-88	
Damages plus accrued interest	$ 50,725.96
X T-Bill Rate (in %)	6.70
X Duration (in years)	1.00
Interest During Calendar Year	3,398.64
NEW Damages plus accrued interest	$ 54,124.60
-1-1-89 to 12-31-89	
Damages plus accrued interest	$ 54,124.60
X T-Bill Rate (in %)	8.80
X Duration (in years)	1.00
Interest During Calendar Year	4,762.96
NEW Damages plus accrued interest	$ 58,887.56
-1-1-90 to 12-31-90	
Damages plus accrued interest	$ 58,887.56
X T-Bill Rate (in %)	8.10
X Duration (in years)	1.00
Interest During Calendar Year	4,769.89
NEW Damages plus accrued interest	$ 63,657.45

-1-1-91 to 8-30-91	
Damages plus accrued interest	$ 63,657.45
X T-Bill Rate (in %)	6.14
X Duration (in years)	.67
Interest During Calendar Year	2,618.74
NEW Damages plus accrued interest	$ 66,276.19

APPENDIX F

F-1

UNITED STATES DISTRICT COURT,
S.D. FLORIDA.
No. 84-6034-CIV.

Herman CORN, Trustee, Plaintiff,
v.
CITY OF LAUDERDALE LAKES,
et al., Defendants,

May 20, 1992.
(794 F.Supp. 364 (S.D.Fla.1992))

ORDER AWARDING ATTORNEYS' FEES AND COSTS

PAINE, District Judge.

Background

Plaintiff, HERMAN CORN, Trustee ("CORN"), sued the CITY OF LAUDERDALE LAKES (the "CITY") and several of its officials for damages under Title 42, United States Code, Section 1983,[1] essentially alleging that a CITY ordinance arbitrarily deprived him of a 261-acre parcel without the due process of just compensation. During a four-day non-jury trial held August 12-15, 1991, CORN requested more than $27,000,000.00 in damages for a complete and permanent taking. In its Findings of Fact and Conclusions of Law (DE 208),[2] the Court ruled that CORN's constitutional rights had

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1 "Every person who, under color of [state law], subjects . . . any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

2 The decision is reported at 771 F.Supp. 1557 (S.D.Fla.1991).

been violated, but awarded only $727,875.02 for a partial and temporary taking. The subsequent Final Judgment (DE 209) expressly reserved jurisdiction to consider attorneys' fee and costs.

On February 3, 1992, CORN filed a Motion for Attorneys' Fees and Costs (the "Motion") (DE 236), supported by a memorandum of law (DE 237) and several affidavits (DE 238-44). The CITY has submitted a Memorandum of Law in Opposition to the Motion (the "Response") (DE 254), attaching an affidavit and deposition transcripts as exhibits. Finally, CORN filed his Reply Memorandum on the Motion (the "Reply") (DE 255). The Court has reviewed and considered the entire record, and applied its own knowledge and experience concerning reasonable and proper fees, in resolving the Motion. *See Norman v. Housing Auth. of City of Montgomery*, 836 F.2d 1292, 1303 (11th Cir.1988).

Analysis

1. *Attorneys' Fees*

Title 42, United States Code, Section 1988 was enacted in 1976 "to encourage the enforcement of federal law through lawsuits filed by private persons." *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 737, 107 S.Ct. 3078, 3093, 97 L.Ed.2d 585 (1987) (Blackmun, J., dissenting). It provides that, in any action brought under Section 1983 of that Title, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C.A. § 1988(b) (West Supp.1992). The provision necessitates three distinct inquiries: (a) whether CORN prevailed, (b) whether the court should exercise its discretion in favor of a fee award, and (c) if so, what fee is reasonable.

(a) Prevailing Party

A "prevailing" plaintiff succeeds "on any significant issue in litigation which achieves some of the benefit the party sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983). One who recovers less than all of the damages requested nonetheless "prevails"; the degree of his overall success affects the reasonableness, not the availability, of a fee award. *See Texas State Teachers Assoc. v. Garland Indep. School Dist.*, 489 U.S. 782, 109 S.Ct. 1486, 1493, 103 L.Ed.2d 866 (1989). CORN, who was awarded nearly three-quarters of a million dollars, is clearly a prevailing party.

(b) Discretion

A successful civil rights plaintiff should recover attorneys' fees, unless special circumstances make such an award unjust. *See Newman v. Piggie Park Enter.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968); *Dowdell v. City of Apopka*, 698 F.2d 1181, 1189 (11th Cir. 1983). The CITY cites *Kerr v. Quinn*, 692 F.2d 875, 877 (2d Cir.1982), for the proposition that, "[w]here the merits of a claim are obviously strong and would be so recognized by local counsel and where the probable damage award is high and would be so recognized by counsel, a district court has discretion to deny an application for counsel fees." (DE 254 at 1). But the CITY does not explain how CORN's claim was obviously strong or the damages clearly substantial; indeed, given the CITY's persistent, unwavering resistance to the claim, any such explanation would ring hollow. Moreover, the court does not find that the case was so strong as to preclude the recovery of prevailing party fees.

(c) Reasonable Fee

In *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir.1974), the Fifth Circuit Court of Appeals adopted a twelve-factor method, drawn from the American Bar Association Code of Professional Responsibility, Disciplinary Rule 2-106, for determining a reasonable fee under Section 1988. The trial judge should consider:

(1) the time and labor required;

(2) the novelty and difficulty of the questions involved;

(3) the skill requisite to perform the legal service properly;

(4) the preclusion of other employment by the attorney due to acceptance of the case;

(5) the customery fee;

(6) whether the fee is fixed or contingent;

(7) time limitations imposed by the client or the circumstances;

(8) the amount involved and the results obtained;

(9) the experience, reputation, and ability of the attorneys;

(10) the "undesirability" of the case;

(11) the nature and the length of the professional relationship with the client; and

(12) awards in similar cases.

488 F.2d at 717-19. *Johnson* was widely followed by other courts, and was cited with approval by Congress when it enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. *See* H.R.Rep. No. 94-1558, p. 8 (1976); S.Rep. No. 94-1011, p. 6 (1976). U.S.Code Cong. & Admin.News 1976, pp. 5908, 5953.

The United States Supreme Court has, however, noted that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983). This method, known as the "lodestar approach," *see Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir.1973), presumptively includes all of the *Johnson* factors, except, perhaps, the results obtained or a contingency enhancement. *See Hensley*, 461 U.S. at 434 n. 9, 103 S.Ct. at 1940 n. 9; *Pennsylvania v. Delaware Valley Citizens' Council*, 478 U.S. 546, 564-65, 106 S.Ct. 3088, 3097-98, 92 L.Ed.2d 439 (1986) ("Delaware Valley I"). The undersigned will therefore calculate, then adjust, the lodestar.

i. Reasonable Number of Hours

"[E]xcessive, redundant, or otherwise unnecessary" hours should be excluded form [*sic*] the amount claimed. *Hensley*, 461 U.S. at 434, 103 S.Ct. at 1939. Counsel must exercise the same "billing judgment" in drafting fee applications that they would in preparing client bills. *Id.*

a) State Court

The CITY first argues that the time devoted by CORN's counsel to prosecuting a separate state court action between 1977 and 1984 is not compensable in this federal action (DE 254 at 4-6). But "[t]here is certainly nothing in § 1988 that limits fee awards to work performed after the complaint is filed in [federal] court." *Webb v. Board of Educ. of Dyer County*, 471 U.S. 234,

250, 105 S.Ct. 1923, 1932, 85 L.Ed.2d 233 (1985) (Brennan, J., concurring in part and dissenting in part). The question is whether the state proceeding was "useful and of the type ordinarily necessary to secure the final result" in federal court. *Delaware Valley I*, 478 U.S. at 561, 106 S.Ct. at 3096 (quoting *Webb*, 471 U.S. at 243, 105 S.Ct. at 1928).

CORN's pursuit of state remedies was indeed "useful" herein: the undersigned applied the doctrine of collateral estoppel to the state court ruling that CORN had acquired vested rights in the preordinance zoning (DE 208 at 16), relied upon the ruling to find that CORN possessed a constitutionally protected property interest (DE 208 at 21-22), received evidence developed at the state level in summary fashion to expedite the instant trial, and measured damages through the date that the state appellate decision became final (DE 208 at 29). CORN is therefore entitled to compensation for the state proceeding. *E.g., Robinson v. Ariyoshi*, 703 F.Supp. 1412, 1429 (D. Hawaii 1989).

CORN presents affidavits showing that 419.8 hours of partner time and 30.0 hour of associate time were reasonably expended in the state court action. The CITY disputed CORN's *entitlement* to fees for this service, but presented no contrary evidence as to the *reasonableness* of the hours worked. The Court finds that the time charged represents a reasonable number of hours for pursuing the state court action from 1977 to 1984, through the trial and appellate levels.

b) Federal Court

CORN's counsel expended 880.2 hours of partner time, 792.5 hours of associate time, and 18.2 hours of paralegal/law clerk time in pursuing the federal court action. His experts, Bruce Rogow and Philip Michael

Cullen, III, broadly testify that attorney time "was expeditiously used, with little or no duplication of effort in representing the Plaintiff's interests." (DE 241 at ¶ 8; DE 242 at ¶ 11). The CITY's expert, Michael Burke, however, separately analyzes three distinct phases of the litigation: Phase I, from August 1983 through March 1991, which included trial preparation and participation in two appeals to the Eleventh Circuit; Phase II, from March 1991 through August 1991, which included renewed trial preparation and the non-jury trial itself; and Phase III, from August 1991 to the present, which consists wholly of the fee application.

Phase I

In Mr. Burke's opinion, the 353.6 hours of partner time and 220.9 hours of associate time spent during Phase I were entirely reasonable. There being no dispute, and upon a full review of the record, the Court approves these figures.

Phase II

Mr. Burke does not question the 130 partner hours and 76 associate hours spent on drafting pleadings, conducting discovery, or attending trial during Phase II. He does, however, opine that the 320 hours of partner time and 400 hours of associate time for research and trial preparation during this six-month period is excessive, suggesting that 167 and 195 hours, respectively, would be reasonable. The Court agrees that too much time was billed, particularly since the case was very nearly tried, and assumedly well prepared, during Phase I. It appears that a portion of this time was devoted to bringing new counsel "up to speed," which, in the exercise of billing judgment, should not be charged to

the client. On the other hand, the figures offered by Mr. Burke are too low; the four-day trial presented a number of difficult issues for which CORN's counsel had thoroughly, and quite sensibly, prepared. The Court finds that 200 hours of partner time and 200 hours of associate time are reasonable for research and trial preparation, making a total of 330 partner hours and 276 associate hours during Phase II.

Phase III

Mr. Burke opines that the 13 partner hours expended by lead counsel in preparing the fee application is reasonable. He does, however, suggest that the "special counsel" employed specifically for this phase should have billed 35 hours, not 65, and that an associate working on the matter should have billed 35 hours, not 95.

The Eleventh Circuit Court of Appeals has recognized that, when necessary, a prevailing party may retain special counsel to prepare the fee request. *Jonas v. Stack*, 758 F.2d 567, 569 (11th Cir.1985). Although CORN has offered no real proof of necessity, the Court exercises its discretion in favor of permitting some recovery for the special counsel's work. But 65 hours for the special counsel, and 95 additional hours for an associate, is far too many. The Court will adopt Mr. Burke's expert opinion that 35 hours each is reasonable.[3]

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[3] Paralegal and law clerk time is compensable if the prevailing practice in a given community is to bill these items separately at market rates, rather than to include their cost within the attorneys' hourly rates. *Missouri v. Jenkins*, 491 U.S. 274, 285, 109 S.Ct. 2463, 2470, 105 L.Ed.2d 229 (1989). CORN does not present evidence as to the treatment of paralegal or law clerk time in the

(continued)

In sum, the Court finds the following hours to be reasonable:

Phase	Partner Hrs	Assoc Hrs
State Court	419.8	30.0
Phase I	353.6	220.9
Phase II	330.0	276.0
Phase III	48.0	35.0
TOTAL	1151.4	561.9

ii. Reasonable Hourly Rate

"A reasonable hourly rate is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation." *Norman v. Housing Auth. of City of Montogomery*, 836 F.2d 1292, 1299 (11th Cir.1988) (citing *Blum v Stenson*, 465 U.S. 886, 895-96 n. 11, 104 S.Ct. 1541, 1547-48 n. 11, 79 L.Ed.2d 891 (1984)). The applicant bears the burden of producing satisfactory evidence that the requested rate is reasonable in the market. *Norman*, 836 F.2d at 1299 (citing *NAACP v. City of Evergreen*, 812 F.2d 1332, 1338 (11th Cir.1987)).

(fn. continued)
South Florida legal community, although Mr. Rogow's listing of attorney and paralegal/law clerk rates may imply that they are billed separately. More importantly, the Court finds that a reasonable fee in this case should not include compensation for the 18.2 hours of paralegal/law clerk time billed.

a) State Court

Throughout the state court litigation, CORN paid his attorneys on an hourly basis, at rates ranging from $56 per hour in 1977 to $98 per hour in 1984.[4] The Court finds these rates reasonable.

b) Federal Court

In determining reasonable rates for the federal contingency work, the Court must first consider the time delay in payment. "Clearly, compensation received several years after the services were rendered — as it frequently is in complex civil rights litigation — is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed, as would normally be the case with private billings." *Missouri v Jenkins*, 491 U.S. 274, 283, 109 S.Ct. 2463, 2469, 105 L.Ed.2d 229 (1989). Thus, "an appropriate adjustment for delay in payment," through the use of current hourly rates or historical rates adjusted to present value, "is within the contemplation of the statute." *Id.* The Eleventh Circuit "does not mandate any particular method for correcting the delay in payment." *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 775 n. 7 (11th Cir.1991).

The undersigned generally prefers to use adjusted historical rates as a more accurate calculation. In the instant case, however, where services have been rendered over a period of eight years, and the Court has made several adjustments to the hours claimed, it would be extremely difficult, if not impossible, to accurately compute interest on the aged account. Thus the fee for

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[4] Although CORN subdivided the 449.8 hours into partner and associate hours, it appears that the client was billed at one rate for all work performed.

services rendered in the federal action will be based on current hourly rates.

Mr. Rogow testifies, on CORN's behalf, that the current market rates are $200.00 per hour for partners and $150.00 per hour for associates. (DE 241 at ¶ 3). He concurrently offers expert testimony as to the historical hourly rates for partner and associate time. (*Id.*). The Court, however, finds those rates to be excessive and contradicted by CORN's own counsel: although Mr. Rogow testifies that the market rate for partners in 1984 was $150.00 per hour, CORN's counsel in late 1983, Gary Farmer, himself a partner with Abrams, Anton, Robbins, Resnick, Schneider & Mager, P.A., charged only $98.00 per hour. The quote for current rates is similarly excessive.

In response, Mr. Burke testifies that the prevailing hourly rates for civil rights attorneys range from $150.00 to $250.00 for partners and from $85.00 to $150.00 for associates. He then offers specific opinions as to the reasonable rate, between $75.00 and $175.00 per hour, for each individual participating attorney.

Upon consideration of the full record, the undersigned finds that (i) all of CORN's counsel possessed, and demonstrated, a level of skill commensurate with that of qualified attorneys in the South Florida legal community, and (ii) hourly rates of $175.00 per hour for partners and $125.00 per hour for associates who worked on the federal litigation are reasonable.

iii. Lodestar

a) State Court

Hours	Rate	Fee
449.8	$56-98	$35,648.00

b) Federal Court

Type	Hours	Rate	Fee
Partner	731.6	$175.00	$128,030.00
Associate	531.9	125.00	66,487.50
TOTAL	1263.5	—	$194,517.50

iv. Adjustment to Lodestar

a) State Court

As with the foregoing discussion of the time delay in payment on contingency cases, the Court recognizes that a dollar now has far less purchasing power than a dollar paid by CORN to his counsel several years ago. The lodestar calculation for state court services will therefore be adjusted, as requested, "to compensate the Plaintiff for the delay in receiving reimbursement on these fees." *See Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.*, 776 F.2d 646, 663 (7th Cir.1985). CORN has offered unrebutted expert testimony that an inflation adjustment, based upon the 90-day Treasury Bill rates employed by the Court in its Findings of Fact and Conclusions of Law (DE 208 at 13), equals $39,195.00, for a total adjusted award of $74,843.00.

b) Federal Court

If the plaintiff achieved only partial or limited success, then the lodestar must be reduced to an amount that is not excessive. *Norman v. Housing Auth. of City of Montgomery*, 836 F.2d 1292, 1302 (11th Cir.1988) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 436-37, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983)).[5] While CORN prevailed on the only liability issue decided by the Court,[6] and was awarded $727,875.02 in damages, his overall success was nonetheless limited: the Court rejected his positions regarding the fair market value of the property, the loan-to-value ratio on the proposed project, and the period, physical scope, and permanence of the taking. For this reason, a downward adjustment of the lodestar is warranted.

On the other hand, CORN has presented evidence sufficient to justify a contingency enhancement under Eleventh Circuit precedent. In *Pennsylvania v. Delaware Valley Citizens' Council*, 483 U.S. 711, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987) (*"Delaware Valley II"*), a four-justice plurality wrote that "enhancement for the risk of nonpayment should be reserved for exceptional cases," *id* at 728, 107 S.Ct. at 3088, while a four-justice dissent noted that "a fee that may be appropriate in amount when paid promptly and regardless of the outcome of the case, may be inadequate and inappropriate when its payment is contingent upon winning

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[5] Alternatively, the reasonable number of hours could be reduced, prior to calculating the lodestar, to reflect the limited success. *See Hensley*, 461 U.S. at 436-37, 103 S.Ct. at 1941.

[6] Because the Court found the CITY liable for an arbitrary and capricious due process taking, it did not consider whether the ordinances went "too far" and entitled CORN to just compensation under the Fifth Amendment (DE 208 at 25).

the case." *Id.* at 735, 107 S.Ct. at 3091. Justice O'Conner, as the swing vote, adopted the compromise position that no enhancement for risk is appropriate unless the applicant can establish that (i) without the enhancement the prevailing party would have faced substantial difficulties in finding counsel in the local or other relevant market, and (ii) the rate of compensation for "contingent fee cases as a class" in the relevant market was different from cases in which payment was certain. *Id.* at 731-34, 107 S.Ct. at 3089-91, *cited in Martin v. University of South Alabama*, 911 F.2d 604, 611 (11th Cir.1990). "Her conclusion thus forms the majority opinion and generally is recognized as the holding of the Court." *Lattimore v. Oman Const.*, 868 F.2d 437, 439 n. 4 (11th Cir.1989).

CORN has, through expert affidavits, established both prongs of Justice O'Connor's *Delaware Valley II* test. The question becomes what degree of multiplier is appropriate. The *Delaware Valley II* plurality wrote that, as a general rule, the lodestar should be enhanced by no more than one-third. 483 U.S. at 730, 107 S.Ct. at 3089. Justice O'Connor did not discuss this proposed cap on the multiplier. Although the Eleventh Circuit has since affirmed a trial judge's decision to double the lodestar, *see Lattimore*, 868 F.2d at 440, the undersigned would be very reluctant to use a multiplier greater than 1.33.

In any event, the Court finds that (i) $194,517.50 represents a reasonable fee for the federal litigation, and (ii) a downward adjustment to reflect the partial success obtained by CORN is counterbalanced by an upward adjustment to reflect the contingency fee risk.

v. Conclusion

CORN is a prevailing party entitled to an award of reasonable attorneys' fees under Title 42, United States code, Section 1988. Using the adjusted lodestar method, the Court will award the following fees as reasonable:

Phase	Fee
State Court	$ 74,843.00
Federal Court	194,517.50
TOTAL	$269,360.50

2. *Costs*

The parties agree that the following taxable costs are allowed under Title 28, United States Code, Section 1920:

1.	Fees of the Clerk and Marshall	$ 624.50
2.	Fees of court reporters	3,048.25
3.	Fees and disbursements for witnesses	136.58
	TOTAL	$3,809.33

The Court agrees with the CITY that CORN has not provided sufficient detail as to what photocopies were made "necessarily obtained for use in the case," rather than for the convenience of counsel, *see Allen v. Freeman*, 122 F.R.D. 589, 591 (S.D.Fla.1988), and has not shown the per copy rate charged. Thus, photocopying costs will not be taxed.

3. *Expenses*

Finally, CORN seeks reimbursement for several items that are not statutorily taxable costs, do not impact upon the lodestar calculation, but nevertheless represent legitimate litigation expenses. *Dowdell v. City of Apopka*, 698 F.2d 1181, 1191-92 (11th Cir.1983); *Allen*, 122 F.R.D. at 591 (award should include "reasonable out-of-pocket expenses of the attorney beyond normal overhead"). The Court finds the following expenses to be reasonable:

1.	Computerized legal research	$4,000.00
2.	Long distance phone service	102.89
3.	Postage	136.44
4.	Delivery service charges	300.00
5.	Express mail charges	25.00
6.	Telefax charges	50.00
	TOTAL	$4,614.33

Conclusion

It is hereby ORDERED and ADJUDGED that

1. The Motion (DE 236) is GRANTED.

2. CORN shall recover from the CITY $269,360.50 in attorneys' fees, $3,809.33 in taxable costs, and $4,614.33 in litigation expenses, for a total of $277,784.16, which shall bear interest at the rate of 4.40 percent per annum.

DONE and ORDERED.

APPENDIX G

DISTRICT COURT OF APPEAL OF FLORIDA,
Fourth District.

No. 78-2438.

CITY OF LAUDERDALE LAKES, a Florida municipal corporation, Howard Craft, Mayor of the City of Lauderdale Lakes; Alfonse Gereffi, Jerome J.Cohan, Morris Klein, Lyman L. Allen, Louis Greenwald, Harry Kaufman, City Coucilmen; and Ben Eigner, Building Official, Appellants,

v.

Herman CORN, Trustee, Appellee.

Feb. 16, 1983.
(427 So.2d 239)

HERSEY, Judge.

The city appeals from a final judgment invalidating certain zoning ordinances as they refer to appellee and to specific real property owned by appellee, requiring the city to approve a site plan (conditioned upon the correction by appellee of three specified deficiencies) and, ultimately, to issue a building permit.

Prior to June, 1966, appellee acquired 261 acres of real property in the unincorporated area of Broward County. After preliminary negotiations with the city (there is a conflict of testimony, unresolved in the circuit court, as to which party initiated these negotiations), appellee presented the city with a proposed development plan. The parcel was then annexed by the city and three ordinances were adopted zoning the property in accordance with the previously approved development plan. Appellee proceeded over the next several years to

develop the property as permitted by the ordinances and as contemplated by the plan.

In 1969 the city attempted to change the zoning of a portion of appellee's property to prohibit a contemplated project permitted by the original zoning. Litigation ensued resulting in a judgment holding that the city was estopped from changing the zoning. No appeal was taken from that judgment.

The next activity of consequence concerns the portion of the property specifically in issue here. That parcel is zoned C-1A, a commercial use zone, and lies immediately north of a canal designated as C-13. According to appellee the canal was so located to insulate residential areas from this commercial property. Pursuant to applicable ordinances appellee filed, for approval, a proposed set of preliminary site plans for a shopping center in one area of the commercial property and a mini-warehouse complex on the westernmost portion of that parcel. The various city departments and officials processed the site plans and after sundry amendments and recommendations, the site plan along with the Planning and Zoning Board's recommendation of approval was presented to the City Council, at a public meeting on May 31, 1977. After discussion about the assessed valuation of the land and a comment directed toward aesthetics the matter was tabled. It was reconsidered and again tabled at meetings on June 14, 1977, and June 21, 1977, and at the latter meeting was rescheduled to be considered on July 12, 1977.

At the meeting of July 12, 1977, the City Council for the first time discussed changes in the zoning code to eliminate mini-warehouses as use permitted in property zoned C-1A (Ordinance # 548) and to change the classification of appellee's parcel from C-1A to B-3 (Ordinance # 549). These ordinances were adopted. Another ordinance, # 552, imposing a building

moratorium on appellee's property was also proposed and it was adopted at a subsequent meeting. After adoption of the two ordinances the council took up the matter of appellee's preliminary site plan. The council voted unanimously to deny approval. This litigation ensued.

The circuit court ultimately entered a final judgment which contained findings of fact concluding that events transpired much as recorded in the foregoing synopsis and including the following specific findings which are particularly pertinent to this appeal.

> The evidence presented in this case indicates that the Plaintiff's efforts were in accordance with the development plan submitted to and approved by the City, and further, that the entire cost of the initial land development was borne by the Plaintiff. These costs included but were not limited to, land clearing, demucking, filling and grading of the land and the construction of a system of canals and waterways throughout the 261-acre parcel of land. This system of canals and waterways specifically included the canal known as the C-13 canal, which separated the C-1A property from other residentially-zoned acreas [sic] within the 261 acres.
>
> . . . .
>
> The evidence further establishes that the Plaintiff in this cause has expended in excess of $100,000.00 in preparing the C-1A property to be developed in accordance with the previously approved Ordinances # 103 and # 105. These sums were expended in reliance upon the City's action with reference to the assignment of the C-1A classification to the property in question.

They would have not been expended had it not been for the action of the City in designating the property under the zoning classification of C-1A.

. . . .

Prior to July 12, 1977, the City of Lauderdale Lakes sent or published no notices to the Plaintiff of any public hearing to be held on the question of whether or not Plaintiff's C-1A property should be re-zoned or that a hearing would be held on any specific re-zoning proposal. In fact, the City of Lauderdale Lakes had made no effort whatever to re-zone Plaintiff's C-1A property from July 12, 1966, to July 12, 1977, a period of 10 years.

. . . .

The Court finds from the evidence presented that Ordinances # 548, # 549 and # 552 were enacted by the City improperly and not in accordance with the requirements of the City Charter. Further, the evidence specifically indicates that the City Council was reacting to the demands of the residents of the near-by condominium building (the Amicus Curiae herein) and was attempting to satisfy the demands of these residents without consideration for the rights of the Plaintiff herein pursuant to the Ordinances of the City of Lauderdale Lakes. Finally, the Court finds from a review of all of the evidence that the preliminary site plans presented by the Plaintiff with reference to the proposed mini-warehouse/ shopping center development contained 3 specific deficiencies. It is the further finding of the Court that these deficiencies were before

> the City Council, but the City Council did not provide the Plaintiff with an opportunity to correct the deficiencies in question. The evidence establishes that the City Council was required to give the Plaintiff the opportunity to correct the deficiencies; and when the corrections were made, the Ordinances of the City of Lauderdale Lakes would require the City Council to approve final site plans.

The final judgment determined that because appellee not only expended money but also made substantial physical changes in the land in reliance upon the city's undertaking in adopting the original zoning ordinances, it would be grossly unfair at this late date to permit the city to change the zoning The trial court further declared ordinances numbered 548, 549 and 552 invalid and unenforceable for failure of the city to follow its own notice and procedure requirements and for lack of evidence to support a showing that these ordinances "were enacted as a result of compelling reasons or [of--sic?] public health and safety."

The trial court held that the city was "estopped to deny Plaintiff's [appellee's] rights in [the original] zoning classification." The court then directed the city to approve the site plan when the designated deficiencies had been corrected and in due course to issue an appropriate building permit.

The city suggests four impediments to the validity of the final judgment. We address the issues as presented by appellant city.

I
WAS RELIEF BY WAY OF MANDAMUS LEGALLY SUSTAINABLE UNDER THE FACTS AND LAW OF THIS CASE.

Relying on case law holding that mandamus will not lie to compel the doing of a discretionary act, the city points to language in appellee's petition for mandamus complaining that the City Council "failed to exercise good faith in the discharge of their judgment and limited discretion for the preliminary approval of site plans." Appellant cites State ex rel. Zuckerman-Vernon Corp. v. City of Miramar, 306 So.2d 173 (Fla. 4th DCA 1974) in support of its proposition that mandamus is not available under such circumstances.

In Broward County v. Narco Realty Inc., 359 So.2d 509 (Fla. 4th DCA 1978) we receded from any suggestion which might be taken from the language in Zuckerman-Vernon Corp. that mandamus never lies to requires approval of a plat. We specifically held in Narco Realty Inc. that where all of the legal requirements for platting land have been met there is no residual discretion to refuse plat approval and mandamus will lie. The same reasoning applies to approval of site plans. Here disapproval was not based upon the three technical deficiencies but instead followed from a change in zoning. That change having been invalidated there is no impediment to requiring the formality of approval upon the correction of those deficiencies. No element of discretion remains once the legal requirements have been met. As we said in the Narco Realty Inc. case:

> All persons similarly situated should be able to obtain plat approval upon meeting uniform standards. Otherwise, the official approval of a plat application would depend upon the whim

or caprice of the public body involved. Yokley, in his work, Law of Subdivisions, § 52, states:

"Thus, while public policy requires municipal control of such development, nevertheless, the authority of a town to deny a landowner the right to develop his property by refusing to approve the plat of such development is, by statute, made to rest upon specific standards of a statute or implementing ordinances. Thereafter, the approval or disapproval of the plat on the basis of controlling standards becomes an administrative act."

Likewise, in Section 53 of the same work, the author states:

"When the statutes and ordinances have been complied with in making a plat of a subdivision, the active approval by a village board has been held to be ministerial, and such act may be enforced by a writ of mandamus."

4 Anderson, American Law of Zoning (Second Edition) § 26.04, (1976) states:

"Mandamus to compel plat approval has been successful where the court, applying common-law principles, determined that when a subdivider has complied with all of the standards for plat approval, such approval is a ministerial act which the court may compel through a writ of mandamus . . . ." Id. at 510.

II

WAS THERE COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THE COURT'S CONCLUSION THAT THE APPELLEE HAD EXPENDED IN EXCESS OF $100.000.00 IN PREPARING THE PROPERTY IN QUESTION FOR DEVELOPMENT PURSUANT TO ORDINANCES 103 AND 105 AND THAT SUCH EXPENDITURES WERE MADE IN RELIANCE UPON THE CITY'S ACTION WITH REFERENCE TO THE CLASSIFICATION OF THE PROPERTY IN QUESTION AND A 1969 LAWSUIT.

III

WAS IT ERROR FOR THE TRIAL COURT TO FIND THAT THE APPELLEE HAD A VESTED RIGHT TO THE ZONING CLASSIFICATION C-1A PERMITTING THE ERECTION OF MINI-WAREHOUSE/SHOPPING CENTER.

In essence appellant argues that there was not substantial competent evidence to support the application of an equitable estoppel against the city.

It is well established that "[a]n owner of property acquires no vested rights in the continuation of existing zoning or land use regulations as to such property unless matters creating an estoppel against the zoning authority have risen." City of Gainesville v. Cone, 365 So.2d 737, 739 (Fla. 1st DCA 1979). Thus a municipality "may be equitably estopped to enforce a change in zoning regulations against one who has substantially altered his position in reliance upon the original regulation, . . ."

City of Miami Beach v. 8701 Collins Ave., 77 So.2d 428, 429 (Fla.1954). The test for application of the doctrine is stated succinctly in Town of Largo v. Imperial Homes Corporation, 309 So.2d 571, 572 (Fla.2d DCA 1975):

> The doctrine of equitable estoppel is applicable to a local government exercising its zoning power when a property owner
>
> (1) relying in good faith
>
> (2) upon some act or omission of the government
>
> (3) has made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights he has acquired.

The final judgment determined that appellee relied in good faith upon zoning enacted by the city to induce him to request annexation of his property by the city and that he (1) expended considerable sums of money and (2) substantially changed the nature and contour of the land and its drainage system because of that reliance. Accordingly, the judgment concluded it would be grossly unfair to permit the city to change the zoning in midstream. The findings of fact are supported by substantial competent evidence and the conclusions of law follow logically from the findings. We are not permitted and we therefore have not attempted to reweigh the evidence or to consider the relative credibility of testimony.

We come, then, to appellant's final point on appeal.

IV

WAS IT ERROR FOR THE COURT TO DIRECT THE CITY TO APPROVE SITE PLANS AND ISSUE A PERMIT UPON THE CORRECTION OF CERTAIN DEFICIENCIES IN SAID PLAN AND IN EFFECT TAKE AWAY FROM THE APPELLANT THE DISCRETIONARY DUTIES OF THE LEGISLATIVE BODY.

To the extent that appellant's statement of this argument raises the issue of the discretionary power of the municipality to act or not to act where all legal requirements have been met, we refer back to our conclusions under Point I. The new ordinances were struck down for failure of the city to fulfill its own notice and procedural requirements. The implication that this is an interference with a legitimate exercise of the legislative prerogative is unwarranted. To the extent, also, that the point suggests that approval of a plat or a site plan is a legislative function, we disagree and adhere to the view that such a function is administrative rather than legislative.

Of ultimate importance, however, is the fact that the city has been found to be equitably estopped from changing the zoning. To suggest that this usurps a legislative function or that the discretion remains nonetheless to thwart appellee's site approval would not only be counter-productive but indeed a contradiction in terms and a reversal of the legislative and judicial roles. Obviously circumstances may be envisioned which would preclude an estoppel as where the public health or safety is placed in jeopardy. In the absence of evidence of some such factor, however, a municipality will be held to the same standards of fair dealing that are

applied to other entities. That was done here and we find no error.

In light of our holding that the doctrine of equitable estoppel requires affirmance of the judgment under review we do not consider whether application of the doctrine of estoppel by judgment based upon the 1969 judgment would similarly support an affirmance.

Having determined that the final judgment is supported by substantial competent evidence, we affirm.

AFFIRMED

ANSTEAD and BERANEK, JJ., concur.

APPENDIX H

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NUMBER 77-12955
JUDGE FRANK ORLANDO

HERMAN CORN, Trustee,

Plaintiff,

vs.

CITY OF LAUDERDALE LAKES, etc., et al.,

Defendants.

[stamp—RECEIVED, OCT 24 1978]

FINAL JUDGMENT

THIS CAUSE came before the Court on the Plaintiff's Amended Complaint having been filed heretofore; and the Court having considered the allegations made in said Complaint, the defenses raised thereto and having heard the evidence presented by the parties in a non-jury trial conducted over a three-day period, including the position provided to the Court by the Amicus Curiae, Topaz South Condominium Association, Inc., renders this, its Final Judgment, and concludes as follows:

This dispute involves the Plaintiff's contention that the Defendants have improperly prohibited the development of a portion of its land previously zoned by the City of Lauderdale Lakes under the classification of C-1A, and further, that the City of Lauderdale Lakes has improperly re-zoned the property in question.

The facts presented indicate that in June, 1966, the City Council of Lauderdale Lakes passed Ordinances #103 and

#104. Ordinance #103 provided for the zoning category C-1A within the City of Lauderdale Lakes and provided for the submission of site plans to the City Council for a review in conformity with the provisions of Ordinance #103, prior to the issuance of a building permit. Ordinance #104 was the action of the City Council which annexed the 261 acres which contains the property in question in this litigation.

On July 12, 1966, the City of Lauderdale Lakes did pass Ordinance #105, which specifically applied the zoning classification C-1A to the specific property involved herein, which, generally speaking, is that portion of the 261 acres annexed into the City lying immediately west of State Road 7 and immediately north of the C-13 canal. (The legal description of the property in question being contained in the pleadings filed herein) Subsequent to the action of the City Council on July 12, 1966, the Plaintiff, in accordance with the previously-approved overall plan, undertook to develop the property in question.

The evidence presented in this case indicates that the Plaintiff's efforts were in accordance with the development plan submitted to and approved by the City, and further, that the entire cost of the initial land development was borne by the Plaintiff. These costs included, but were not limited to, land clearing, demucking, filling and grading of the land and the construction of a system of canals and waterways throughout the 261-acre parcel of land. This system of canals and waterways specifically included the canal known as the C-13 canal, which separated the C-1A property from other residentially-zoned acreas within the 261 acres.

Thereafter, the Plaintiff proceeded to develop the residential portions of the 261 acres in accordance with the previously referred to development plan. In 1969, a disagreement between the Plaintiff and the Defendants took place with reference to a proposed development on that portion of the

261 acres which were zoned R-4A. This dispute was considered in Case Number 69-6829, which was assigned to and heard by the former member of this Court, Circuit Judge John Moore, II.

On January 28, 1970, pursuant to a Motion for Summary Judgment, the said Judge John Moore entered his Order, which, in effect, estopped the City of Lauderdale Lakes from changing the zoning classification assigned to the property in question in that litigation and nullified the City's attempts to change the zoning of the property.

The evidence further establishes that the Plaintiff in this cause has expended in excess of $100,000.00 in preparing the C-1A property to be developed in accordance with the previously-approved Ordinances #103 and #105. These sums were expended in reliance upon the City's action with reference to the assignment of the C-1A classification to the property in question. They would not have been expended had it not been for the action of the City in designating the property under the zoning classification of C-1A.

Ultimately, a proposed set of preliminary site plans was devised on behalf of the Plaintiff proposing the construction of a small shopping center on the eastern-most portion of the C-1A property and for the construction of a mini-warehouse complex on the western-most portion of the C-1A property.

By Ordinance #455, Section 1, adopted May 13, 1975, the City of Lauderdale Lakes has adopted the Broward County Zoning Classifications, Restrictions and Regulations, subject to certain amendments thereto not applicable to these proceedings. Section 3.41 (6) of the Broward County Zoning Classifications specifically provides that a developer may submit preliminary site development plans for review by the appropriate site plan review committee for planning and zoning officials.

Section 6-45 of the City Code of the City of Lauderdale Lakes further provides for the submission of site plans for preliminary approval by the City Council. This same Ordinance further provides for the submission of eight (8) copies of proposed site plans to be filed with the City Clerk, who shall thereafter distribute a copy of the site plans to the following officials of the City of Lauderdale Lakes:

(a) The Chief Building Official;

(b) The City Engineer or Consulting Engineers;

(c) The Police Department;

(d) The Fire Department;

(e) The Public Works Department, and

(f) The Planning and Zoning Board.

Following review by the foregoing officials, the site plans are to be brought before the City Council for preliminary approval, at which time, recommendations of the reviewing officials are presented to the City Council. Following preliminary approval, site plans may be amended in accordance with recommendations of the City Council and thereafter submitted for a final approval by the City Council. Disapproval of site plans under the Ordinance contemplates a revision by the applicant.

The City of Lauderdale Lakes has also adopted Section 6-21 of the City Code, which adopts the Broward County Edition of the South Florida Building Code, together with all amendments thereto, subject to certain amendments not pertinent to these proceedings. By this Ordinance, all buildings constructed within the City must conform to the construction standards contained therein.

Among the Broward County Zoning Regulations adopted by the City of Lauderdale Lakes is Section 9.3 of the Broward County Regulations relating to off-street parking,

which contains the following minimum parking space requirements pertinent to these proceedings:

> "23. Manufacturing and industrial uses, research and testing laboratories, bottling establishments, printing and engraving shops, warehouses, motor vehicle sales rooms, wholesale stores, laundries and storage buildings, provided that exterior off-street areas adjacent to overhead doors may be utilized for required off-street parking for warehouses and storage buildings only: 1 parking space for each 600 square feet of floor area of the building.
>
> 28. For the purpose of this article, floor area shall mean the gross floor area inside of the exterior walls * * *."

The City of Lauderdale Lakes has also adopted, among others, Section 3-1.1.10 of the National Fire Code, which provides in pertinent part that:

> "All premises which the Fire Department may be called upon to protect in the case of fire and which are not readily accessible from public roads shall be provided with suitable gates, access roads, and fire lanes, so that all buildings on the premises are accessible to fire apparatus. Fire lanes shall be provided for all buildings which are set back more than 150 feet from a public road or exceed 30 feet in height and are set back over 50 feet from a public road. Fire lanes shall be at least 20 feet in width with the road edge closest to the building at least 10 feet from the building. When any combination of private fire protection facilities, including but not limited to, fire resistive roofs, fire separation walls, space separation and automatic fire extinguishing systems, are provided and approved by the Fire Marshal as an acceptable alternate, Section 3-1.1.10 shall not apply."

Among the Broward County Zoning Regulations adopted by the City of Lauderdale Lakes is Section 3.41(9)(b), which provides as follows:

> "The main building line of all structures shall be a minimum of five (5) feet from the closest point of all parking areas."

Section 6-42 of the City Code of Lauderdale Lakes provides for the review of site plans. It establishes that such plans are first to be examined by the chief building official, the office of the City Engineer, or consulting engineers, the police department, the fire department, the public works department and the Planning and Zoning Board and that each of these officials or agencies shall review proposed site plans:

> "with respect to the compliance of such site plans with the regulations thereto appertaining, including, but not limited to, regulations of zoning, building subdivision, landscaping, and traffic flow and impact. Those agencies, offices, and individuals named herein shall examine such site plans and shall make recommendations, in writing, to the City Council as to whether or not such site plans should be approved by said City Council. In the event any one of such agencies, offices and/or individuals recommend disapproval of a site plan, the reasons therefore shall be stated with specificity and, where applicable, the law, rule and/or regulation upon which such disapproval is based shall be delineated. The City Council shall consider such recommendations as advisory in nature and, after such examination, shall approve or disapprove such site plans; provided, however, that no building permit shall be issued until the site plan pertaining thereto, when required, shall have been approved by the City Council."

The foregoing Ordinance provision, which was initially adopted in August, 1973, and amended in December, 1976, is supplementary to the provisions of Ordinance #103.

All of the foregoing Ordinances were in force in April, May, June and July, 1977.

On April 1, 1977, Plaintiff submitted eight (8) sets of preliminary site plans to the City of Lauderdale Lakes by delivering them to the City Clerk, who thereafter distributed copies to the various officials described in paragraph 46 above.

On April 28, 1978, Plaintiff tendered and paid the required fee for site plan review.

Prior to any formal meetings of the Planning and Zoning Board, Plaintiff's site plans were considered in the workshop session by the Planning and Zoning Board, during which sessions, the officials of the Planning and Zoning Board made various suggestions and recommendations for changes on the preliminary site plans which Plaintiff; architect, Joseph Phillips; and Harold Augustine, engineer, proceeded to adopt and make.

Thereafter, the preliminary site plans were considered at a formal meeting of the Planning and Zoning Board on April 28, 1977, which was ultimately continued on May 2, 1977, and concluded on May 12, 1977.

In response to the circulation of the preliminary site plans, and after a review of same, the Fire Chief of the City of Lauderdale Lakes submitted three reports to the City Clerk, which were reviewed by the Planning and Zoning Board during their consideration of the site plans. In the first report, dated April 13, 1977, the Fire Chief's comments dealt solely with the location, size and configuration of fire hydrants and water mains. His comments indicate a concern with the sufficiency of water flow in fighting any fire at the

warehouse site. In his second report of April 29, 1977, the Fire Chief indicated a rejection of the revised plans because they did not contain an additional fire hydrant which he had suggested. In this letter, he did note, however, that the water mains had been correctly sized. In his final communication, dated May 12, 1977, the Fire Chief of the City of Lauderdale Lakes unequivocally approved the site plans as revised. In this letter, the Fire Chief noted the comments of the City's Consulting Engineers, and indicated that the Fire Chief had reviewed the revised site plans on May 11, 1977, submitted by Plaintiff's engineer.

By letter dated April 5, 1977, the Building Official of the City of Lauderdale Lakes indicated no objection to the site plans, and recommended that a fence be erected around the perimeter of the property on all sides abutting waterways.

By a letter dated April 14, 1977, the Superintendent of Public Works of the City of Lauderdale Lakes found no discrepancies in the site plans and recommended their approval.

The Police Department of the City of Lauderdale Lakes voiced no objections to the site plans. By a letter dated April 15, 1977, nine recommendations were made which dealt with traffic flow, parking provisions and police access to the warehouse area.

With respect to a review of the site plans by the City's consulting engineers, three separate letters from the firm of James M. Montgomery, Consulting Engineers, Inc., dealt with engineering recommendations. In the first letter dated April 14, 1977, the consulting engineers did not specifically recommend approval, but rather pointed out ten areas of comment. Following this letter of April 14, Plaintiff made several changes and amendments to the proposed site plans in accordance with suggestions at the workshop sessions of the Planning and Zoning Board. These revised plans were

then reviewed by the City's Consulting Engineers, who, by a letter dated May 6, 1977, raised seven areas of commentary without approving or disapproving the proposed plans. Plaintiff's engineer responded to the May 6 letter by a letter dated May 11, 1977, which appeared to satisfy all but two of the areas of commentary. The two areas of commentary not covered by Plaintiff's engineer dealt with the parallel parking design within the mini-warehouse area and the "layout" of the mini-warehouse area in relation to fire protection.

The Planning and Zoning Board of the City of Lauderdale Lakes, by a letter dated May 12, 1977, formally recommended approval of Plaintiff's preliminary site plans.

Subsequently, and at the request of the City Council, the Planning and Zoning Board again considered the proposed site plans at a public meeting held on May 26, 1977. The primary focus of this meeting was concerned with the layout of the mini-warehouse area and the access of fire-fighting apparatus and equipment. The Board fully considered all of the evidence discussed in the foregoing paragraphs and voted, with one member dissenting, again to recommend approval. By a letter dated May 27, 1977, the Planning and Zoning Board re-affirmed its recommendation contained in the letter of May 12.

From this point, Plaintiff sought to have his preliminary site plans considered by the City Council of Lauderdale Lakes in accordance with the provisions of Ordinance #103.

At a public meeting of the City Council held on May 31, 1977, Plaintiff's preliminary site plans were laid before the City Council by the Planning and Zoning Board with a recommendation of approval. After some discussion about the assessed valuation of the land, one Councilman, Defendant Alfonso Gereffi, indicated some concern with the proposed plans with respect to the condominiums north and

west of the proposed development. This concern was as to esthetics. The City Council tabled the matter without taking any further action.

Plaintiff's site plans were again considered at a public meeting of the City Council on June 14, 1977. After much discussion concerning the construction and operation of the mini-warehouse concept between Council members and Steven Corn, the City Council again took no final action with reference to the preliminary site plans and again tabled the request for approval.

The preliminary site plans were again brought before the City Council on June 21, 1977, at a public meeting. Again there was discussion between Council members and Steven Corn. On this occasion, the discussion dealt generally with the question of access to fire-fighting apparatus into the mini-warehouse property and the other radii necessary for such apparatus if called to respond to a fire within the complex. At the conclusion of this meeting, action on the preliminary site plans was again tabled so that the Council could have further discussion with the Planning and Zoning Board.

Plaintiff's preliminary site plans were finally acted upon by the Defendant, City's Council, at a public meeting on July 12, 1977. However, prior to the July 12, 1977, City Council meeting, the City Council had met with the Planning and Zoning Board. No subsequent recommendation from Planning and Zoning grew out of this joint meeting.

The power of the City of Lauderdale Lakes to re-zone property is subject to Section 25-5.5 of the City Code of Lauderdale Lakes, which provides that:

> "The City Council, by ordinance, from time to time may amend, supplement, change, modify or repeal any existing zoning regulation or restriction in the following

manner: The planning and zoning board, as hereinafter provided, shall hold a public hearing in relation to the proposed change, amendment, supplement, modification or repeal at which parties in interest and citizens shall have an opportunity to be heard. Notice of such public hearing shall be published at least ten (10) days prior to the date set for said public hearing in a newspaper of general circulation within the city. After said public hearing, the said planning and zoning board shall present to the city council, in writing, its recommendation with relation to the proposed change, amendment, supplement, modification or repeal."

Prior to July 12, 1977, the City of Lauderdale Lakes sent or published no notices to the Plaintiff of any public hearing to be held on the question of whether or not Plaintiff's C-1A property should be re-zoned or that a hearing would be held on any specific re-zoning proposal. In fact, the City of Lauderdale Lakes had made no effort whatever to re-zone Plaintiff's C-1A property from July 12, 1966, to July 12, 1977, a period of 10 years.

Notwithstanding the foregoing lack of notice, the first matter on the Defendant City's Agenda at the July 12, 1977, City Council meeting was a proposal by Defendant Councilman Greenwald eliminating mini-warehouses as a permitted use in the C-1A zoning classifications, Ordinance #548; and another proposal to re-zone Plaintiff's C-1A property to a B-3 classification, Ordinance #549. An Ordinance imposing a building moratorium on Plaintiff's property, Ordinance #552, was also proposed and adopted at a later meeting. An extended discussion took place on the merits of these proposed ordinances. Ultimately, both proposed ordinances were enacted by the City Council.

The evidence establishes that the changes proposed by Ordinances #548, #549 and #552 were sudden and unexpect-

ed after Plaintiff's site plans had already been before the City Council on three separate occasions.

Subsequent to the action on Ordinances #548, #549 and #552, the City Council then considered the preliminary site plans of the Plaintiff. There was no discussion with reference to modifications or changes in the site plans so as to satisfy specific objections by the City Council, nor were there any recommendations made which would have informed the Plaintiff as to what should be corrected. Further, there was no discussion with reference to the requirements of Ordinance #103.

The City Council of Lauderdale Lakes, on July 12, 1977, voted unanimously to deny approval of the Plaintiff's preliminary site plans.

The Court finds from the evidence presented that Ordinances #548, #549 and #552 were enacted by the City improperly and not in accordance with the requirements of the City Charter. Further, the evidence specifically indicates that the City Council was reacting to the demands of the residents of the near-by condominium building (the Amicus Curiae herein) and was attempting to satisfy the demands of these residents without consideration for the rights of the Plaintiff herein pursuant to the Ordinances of the City of Lauderdale Lakes.

Finally, the Court finds from a review of all of the evidence that the preliminary site plans presented by the Plaintiff with reference to the proposed mini-warehouse/shopping center development contained 3 specific deficiencies. It is the further finding of the Court that these deficiencies were before the City Council, but the City Council did not provide the Plaintiff with an opportunity to correct the deficiencies in question. The evidence establishes that the City Council was required to give the Plaintiff the opportunity to correct the deficiencies; and when the corrections were

made, the Ordinances of the City of Lauderdale Lakes would require the City Council to approve final site plans.

The Court finds that based on the evidence presented, the deficiency areas are as follows:

1. *Fire Safety*: Specifically, the evidence establishes that the preliminary site plans were approved by the Fire Chief of the City of Lauderdale Lakes. However, it would appear from the expert testimony offered in this area that additional fire hydrants are necessary and that certain parking spaces designated should be removed in order to make the operation of fire-fighting apparatus easier and without hazard. The Court specifically rejects the evidence presented on behalf of the City with reference to the after-the-fact tests concerning turning radii conducted by consulting architects and the City Fire Chief.

2. *Parking Space Regulation*: The preliminary site plans would appear to be deficient with reference to the elimination of parking spaces to facilitate the access and operation of fire-fighting equipment.

3. *Landscaping*: It would appear from the evidence that the preliminary site plans were deficient as to landscaping, in that they do not provide a sufficient barrier by way of trees and other shrubery to protect the appearance and character of the neighborhood and to provide a sufficient separation of this property from the residentially-zoned areas. Further, such barriers would minimize the effects of noise which could generate from the mini-warehouse area to the surrounding residential property.

Based on the foregoing findings of fact, it is the conclusion of this Court as follows:

1. The Plaintiff has established by competent and substantial evidence, taking into consideration the totality of circumstances which began in 1966, including, but not limited

to, his expenditures of money for the C-1A site development. Said expenditures were made in reliance on the actions of the City Council and the ruling of the previously-cited Case Number 69-6829, which did not specifically deal with the C-1A property but did deal with Ordinance #105 which was found to be valid. Based on that finding, it would be inequitable at this time to invalidate Ordinance #105 by approving the action of the City in adopting Ordinances #548, #549 and #552.

Purely aside from the earlier determination, this Court concludes as a result of the evidence in this case that the Plaintiff has made such a substantial change in position in reliance upon the provisions of Ordinances #103 and #105 that it would be inequitable now to permit the City to strip Plaintiff of such rights by virtue of a re-zoning of the property. Apart from the question as to precisely how much money Plaintiff has expended in reliance upon these Ordinances, it is clear that Plaintiff has made a substantial physical change in the characteristics of the land in reliance thereon. As the facts demonstrate, Plaintiff took, in effect, virgin land without salient physical characteristics and constructed on it a system of canal waterways which circumnavigate the C-1A property, setting it off and apart from the residentially-zoned property, so that there was some demarcation or boundary between the separate zoning classifications. This act alone is of such magnitude and character that it would be grossly unfair now to permit the City to change the zoning and to prohibit the Plaintiff from proceeding under the previously-approved development plan.

The City suggests that the result should be otherwise by virtue of the passage of time since the enactment of Ordinance #103 and Ordinance #105 and by virtue of "a change in circumstances" since their enactment. But neither Ordinance #103 nor Ordinance #105 impose a time limitation upon the Plaintiff to carry out the development plans ap-

proved by the City of Lauderdale Lakes in 1966. Moreover, the evidence shows that Plaintiff followed an orderly plan of development, using the approved plans, following the City's action in 1966, and there does not appear to have been any undue delay by the Plaintiff in going forward. The absence of either is fatal to the City's contentions. Moreover, the "change in circumstances" which the City contends exists is the presence of the condominium development which the City itself must have foreseen in approving the zoning classification R-4A by enacting Ordinance #105. As indicated before, the land in question was undeveloped in 1966. By approving Plaintiff's plan of development and enacting the Ordinances, the City of Lauderdale Lakes had to foresee that the accomplishment of Plaintiff's plan of development would result in the presence of the condominium residents. Thus, the "change in circumstances" of which the City complains is the very condition which the City encouraged and permitted to occur by virtue of its approval of Plaintiff's development plans and the enactment of Ordinance #105. Having approved and permitted the circumstance itself to occur, the City cannot now complain that it is such a "change" so as to defeat Plaintiff's right to develop his property in accordance therewith.

The Court further concludes that Ordinances #548, #549 and #552 are invalid and unenforceable because of the failure of the City of Lauderdale Lakes to follow the notice and procedures requirements of its own Ordinance #25-5.5 of the City Code. Further, no competent, substantial evidence was before this Court showing that these Ordinances were enacted as a result of compelling reasons or public health and safety. The record in this case is bare of any evidence which suggests that mini-warehouses are somehow destructive of the public health and safety. In fact, the evidence is to the contrary to the extent that ordinance #103 and Ordinance #105 specifically permit the construction of such a development on the property.

The Court further concludes that, having established a right to relief, the Plaintiff is entitled to a Final Judgment declaring his rights as to the C-1A zoning and requiring the City of Lauderdale Lakes to approve site plans when the deficiencies previously stated herein are corrected, and ultimately, to issue a building permit.

The Court is not unmindful of the concerns of the residents of the Amicus Curiae, Topaz South Condominium Association, Inc., but cannot be swayed from its responsibility by sympathy and must rely solely on the facts and evidence presented in this cause. For their benefit, it should be pointed out that if the mini-warehouse complex is eventually constructed, the City of Lauderdale Lakes, through its police powers and its occupational license requirements, can sufficiently protect these residents from the fears which they have evidenced, both at previously-held City Council meetings and by their appearance in this cause.

Based on the above referred to findings of fact and conclusions of law, it is ORDERED AND ADJUDGED as follows:

1. Final Judgment is hereby entered in favor of the Plaintiff, HERMAN CORN, TRUSTEE, and against the Defendants, CITY OF LAUDERDALE LAKES, a Florida Municipal Corporation; HOWARD KRAFT, Mayor of the City of Lauderdale Lakes; ALFONSO GEREFFI, City Councilman; JEROME COHAN, City Councilman; MORRIS KLEIN, City Councilman; LYMAN L. ALLEN, City Councilman; LOUIS GREENWALD, City Councilman, and HARRY KAUFMAN, City Councilman.

2. The Court finds and declares that when the Plaintiff, HERMAN CORN, TRUSTEE, has complied with all valid ordinances and zoning regulations of the City of Lauderdale Lakes precedent to approval of preliminary site plans, the City of Lauderdale Lakes may not disapprove Plaintiff's

preliminary site plans for the construction of a mini-warehouse/shopping center development on the property owned by Plaintiff and as more particularly described hereafter.

3. The Court finds and declares that Plaintiff, HERMAN CORN, TRUSTEE, has certain vested rights in the zoning classification C-1A as applied to the following described property:

> The South 400 feet of the West 1,065 feet of the East 1,165 feet of that portion of the Northeast quarter lying North of the North right-of-way line of Canal C-13; in Section 24, Township 49 South, Range 41 East, in Broward County, Florida,

as applied to such property by Ordinance #105 of the City of Lauderdale Lakes, and that the Defendant, CITY OF LAUDERDALE LAKES, is estopped to deny Plaintiff's rights in such zoning classification.

4. Ordinances #548, Ordinance #549 and Ordinance #552 of the City of Lauderdale Lakes are void and unenforceable as against Plaintiff or the property described in the foregoing paragraph, and such Ordinances may not be used to impair or defeat the ability of Plaintiff to develop the previously-described property in accordance with the permitted uses of zoning classification C-1A.

5. The Defendant, CITY OF LAUDERDALE LAKES, be and is hereby directed to approve preliminary site plans for a mini-warehouse/shopping center development on the property described in the foregoing paragraphs, when the deficiencies set out above are corrected. Following approval of the preliminary site plans, the Plaintiff shall file a detailed and comprehensive set of site plans which comply with #6-44 of the Code of Ordinances of the City of Lauderdale Lakes and #3.41 of the Broward County Zoning Regulations. Thereafter, the Defendant, CITY OF LAUDERDALE LAKES, and

Defendant, BEN EIGNER, Chief Building Official, shall issue to the Plaintiff a building permit in accordance with such site plans.

6. The Court shall retain jurisdiction of this cause and the parties hereto until such time as full compliance has occurred with respect to all of the foregoing provisions.

7. The Court retains jurisdiction of this cause also for the entry of a final judgment taxing costs, upon proper motion.

DONE AND ORDERED at Fort Lauderdale, Broward County, Florida, this 20 day of Oct., 1978.

/s/ Frank Orlando
CIRCUIT COURT JUDGE

Copy to:
P-G. Farmer, Esq.
D-J. Brady, Esq.
A.C.-R. Zimmerman, Esq.

APPENDIX I

IN THE CIRCUIT COURT IN AND OR
BROWARD COUNTY, FLORIDA

CASE NO. 69 - 6229 - Moore

HERMAN CORN, as Trustee,
Plaintiff,

-vs-

CITY OF LAUDERDALE LAKES,
a municipality organized under the
laws of the State of Florida,
Defendant.

ORDER ON DEFENDANT'S MOTIONS TO QUASH AND DISMISS AND DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND ORDER GRANTING PLAINTIFF PARTIAL SUMMARY JUDGMENT

This cause came on to be heard upon the Plaintiff's Motion for Summary Judgment. At the hearing, it was brought to the Court's attention that the Defendant had filed Motions to Dismiss and Quash the complaint and Motion for Summary Judgment. The Court considered it proper to hear argument and consider all of the aforesaid motions.

After examining the pleadings filed herein, having heard argument of counsel and being otherwise fully advised in the premises, the Court makes the following findings:

1. The Complaint seeks two avenues of relief. The first is that this Court order the Defendant to issue a building permit to the Plaintiff for construction of a building on a portion of the property involved in this

cause. After examining the plans, filed in this proceeding, which the Plaintiff submitted to the Defendant, the Court concludes that they are insufficient upon which to issue a building permit, and therefore Plaintiff's motion for summary judgment on this issue is denied.

If the Plaintiff submits sufficient plans to the Defendant, and the Defendant refuses to issue a building permit, the Court may then consider further action as it deems appropriate and timely.

2. The second avenue of relief sought by the Plaintiff is a declaration as to the status of and the Plaintiff's rights regarding the zoning of the property involved in these proceedings. The uncontroverted facts contained in the sworn complaint, and the facts stated in the Plaintiff's Request for Admission, which have not been denied by the Defendant, and therefore are deemed admitted, show there is no genuine issue of any material fact regarding the second avenue of relief sought by the Plaintiff, and after examining the applicable law, it is thereupon;

CONSIDERED, ORDERED AND ADJUDGED:

1. The Court rules and declares that the property described in the Complaint is zoned in the manner described and set forth in the Defendant's City of Lauderdale Lakes Ordinance #105, a copy of which is part of the record of these proceedings, and that the Defendant is estopped from changing such zoning. The Court further rules that the actions taken by the Defendant's City Council on October 14, 1969, which attempted to change the zoning of Plaintiff's property was ineffectual, and null and void.

2. The Defendant's Motions to Dismiss and Quash the Complaint and Motion for Summary Judgment be and the same are hereby denied.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 28 day of Jan, 1970.

/s/ John H. Moore II
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR
BROWARD COUNTY, FLORIDA

No. 69-6229 (Judge Moore)

HERMAN CORN, As Trustee,
Plaintiff,

vs.

CITY OF LAUDERDALE LAKES,
etc.,
Defendants.

STIPULATION

COME NOW the parties, by and through their respective Attorneys, file this their joint Stipulation and allege unto the Court as follows:

1. That on January 28, 1970 this Court entered its Order granting the Plaintiff a partial Summary Judgment.

2. The parties hereby stipulate and request that this Court enter a Final Judgment in conformity with said partial Summary Judgment granted to the Plaintiff.

3. Upon the entry of said Final Judgment in favor of the Plaintiff and against the Defendant, the parties stipulate that the within cause shall be dismissed as to all matters remaining before this Court which are the subject matter of the said Final Judgment.

4. Said Order of Dismissal to be based upon the Plaintiff's failure to prosecute the remaining Counts of its complaint.

HUGH S. GLICKSTEIN

Attorney for Defendant
2138 Hollywood Blvd.
Hollywood, Florida

By /s/ H. S. Glickstein
HUGH S. GLICKSTEIN

ZINN & REINHARD, P.A.

Attorney for Plaintiff
908 Ainsley Building
Miami, Florida

By /s/ S.N. Reinhard
SANFORD N. REINHARD

ORDER

THIS CAUSE, having come to be heard upon the joint stipulation of the parties and the Court being otherwise fully advised in the premises it is thereupon:

CONSIDERED, ORDERED and ADJUDGED:

1. That a Final Judgment is hereby entered in favor of the Plaintiff and against the Defendant and the Court hereby rules that the property described in the complaint is zoned in the manner described and set forth in the Defendant's, City of Lauderdale Lakes, Ordinance No. 105, a copy of which is a part of these proceedings and the Court rules and finds that said Defendant's [*sic*] is estopped from changing said zoning. The Court further enters this Final Judgment and rules that the actions taken against the Plaintiff by the Defendant's City Counsel on October 14, 1969 to change the zoning of the Plaintiff's property is in effectual and null and void

2. As to all other matters not ruled upon heretofore in these proceeding the within cause is dismissed for want of prosecution.

DONE AND ORDERED in Chambers, in Fort Lauderdale, Broward County this 18 day of May, 1971.

JOHN H. MOORE, II
CIRCUIT JUDGE

APPENDIX J

ORDINANCE #103

AN ORDINANCE PROVIDING A ZONING CATEGORY WITHIN THE CITY OF LAUDERDALE LAKES TO BE KNOWN AS C-1A; PROVIDING THE USES AND RESTRICTIONS TO APPLY IN ZONING DISTRICTS WHERE THE SAID C-1A ZONING CATEGORY HAS BEEN PUT INTO EFFECT.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LAUDERDALE LAKES:

Section 1: There is hereby created a zoning category within the City of Lauderdale Lakes to be designed as C-1A.

Section 2: The uses permitted and prohibited in the zoning category designated as C-1 shall apply to the zoning category designated as C-1A.

Section 3: The height of buildings and plot size in the zoning category designated as C-1 shall apply to the zoning category designated as C-1A.

Section 4: No building or structure shall be erected or altered, on land or water used, or any change of use consummated, nor shall any building permit be issued therefor, unless and until a site development plan for such building, structure and/or use shall have been checked by the enforcing official and the City Council of the City of Lauderdale Lakes for conformity with the Zoning Ordinance.

The site development plan shall include in proper form, detail, dimension and scale, the following:

a. The location, character, size and height of all buildings, structures and uses on the plot, including walls or fences.

b. Location, character and enclosure of all outside facilities for waste storage and disposal.
c. All curb cuts, driveways, parking areas, loading areas.
d. All pedestrian walkways, walls, yards and landscaping.
e. Location, size, character, height and orientation of all signs other than flat or marquee signs.
f. Landscaping.

The site development plan shall conform to all applicable provisions of the Zoning Ordinance and shall in addition thereto provide such a design and arrangement of pertinent features and elements of the development and use of the plot as to:

a. Protect and minimize any undesirable effects upon contiguous and nearby residential property.
b. Provide sufficient offstreet parking and loading facilities so that use of streets in the vicinity for this purpose will not be unavoidable.
c. Provide sufficient setbacks and yard spaces adjacent to streets and to residentially-zoned property, with adequate landscaping in such yard and setback areas, in order to protect the appearance and character of the neighborhood.
d. Provide sufficient walls, fences, enclosures and/or hedges to prevent or minimize effects of noise, glare, odors, smoke, soot, upon surrounding residential property.[7]

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[7] [There is no Section 5 listed in original.]

Section 6: This ordinance shall take effect immediately upon its adoption by the City of Lauderdale Lakes.

Passed on first reading by title only at the Special meeting of the City Council June 24, 1966.

Passed on second reading in full at the regular meeting of the City Council July 12, 1966.

ADOPTED at the regular meeting of the City Council of the City of Lauderdale Lakes July 12, 1966.

/s/ Edward Hepp
Mayor

ATTEST:

/s/ Audrey Tolle
City Clerk

ORDINANCE NO. 104

AN ORDINANCE ANNEXING CERTAIN LANDS INTO THE CITY OF LAUDERDALE LAKES AND REDEFINING THE BOUNDARIES OF THE CITY TO INCLUDE SAID LANDS WITHIN SAID BOUNDARIES.

WHEREAS, the Owner of the land described herein has petitioned in writing to the City Council of the City of Lauderdale Lakes to annex said land to the City, and

WHEREAS, said land is larger than five (5) acres and is contiguous to the City limits of the City of Lauderdale Lakes; and

WHEREAS, it is considered to be in the best interest of the City of Lauderdale Lakes to annex said lands to the City;

NOW, THEREFORE,
BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LAUDERDALE LAKES:

Section 1: The City of Lauderdale Lakes does hereby, pursuant to Chapter 65-1140 Laws of Florida Acts of 1965, annex to and redefine the boundaries of the City of Lauderdale Lakes to include the following lands as of the date hereof:

All that portion of the Northwest quarter (NW 1/4), lying Easterly of the Easterly right-of-way line of the Sunshine State Parkway; and all that portion of the Northeast quarter (NE 1/4), lying North of the South right-of-way line of Canal C-13, Excepting therefrom the North one-half (N 1/2) of the Northeast quarter (NE 1/4) of said Northeast quarter (NE 1/4), all in Section 24, Township 49 South, Range 41 East; and all that portion of the West one-half

(W 1/2) of Section 19, Township 49 South, Range 42 East, lying West of the Easterly right-of-way of State Road No. 7, as now located and constructed, and lying North of the South right-of-way line of Canal C-13, Said lands situate in Broward County, Florida.

Section 2: The annexed territory, shall from the effective date hereof, be and become an integral part of the City of Lauderdale Lakes, and all Ordinances of the City of Lauderdale Lakes shall apply in said newly annexed territory and the powers of the City shall extend to such territory in the same manner as in the territory initially incorporated, as provided by law.

Passed on first reading by title only at the Special meeting of the City Council June 24, 1966.

Passed on second reading in full at the Regular meeting of the City Council July 12, 1966.

ADOPTED at the Regular meeting of the City Council of the City of Lauderdale Lakes July 12, 1966.

/s/ Edward Hepp
Mayor

ATTEST:

/s/ Audrey Tolle
City Clerk

ORDINANCE #105

AN ORDINANCE RELATING TO ZONING OF CERTAIN LANDS WITHIN THE CITY OF LAUDERDALE LAKES BY CHANGING THE ZONING CLASSIFICATION OF SUCH LANDS FROM A-1 TO R-1C; R-1D; R-4A; C-1A AND B-3; AND MAKING THIS ORDINANCE EFFECTIVE IMMEDIATELY.

WHEREAS, pursuant to the provisions of Ordinance #3 of the City of Lauderdale Lakes, the zoning plan and calssification [*sic*] of Broward County were adopted as the zoning plan and classifications of the City; and

WHEREAS, the lands hereinafter described being within the territory limits of the City of Lauderdale Lakes were zoned A-1 classification pursuant to said Ordinance #3; and

WHEREAS, the City Council believes it is in the best interest of the City to change the zoning classification of said lands, and a public hearing having been held in regard to rezoning of said lands;

NOW, THEREFORE;

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LAUDERDALE LAKES:

Section 1: Notwithstanding the provisions of Ordinance #3 adopted by the City Council of the City of Lauderdale Lakes on July 20, 1961, the following described land is zoned and classified as R-1C; R-1D; R-4A; C-1A and B-3:

A-1 TO R-1C

A parcel of land in the North 1/2 of Section 24, Township 49 South, Range 41 East, being more

particularly described as follows:

Commencing at the Northwest corner of the NE 1/4 of said Section 24; thence run South 89° 54′ 00" East (on an assumed bearing) 351.38 feet along the North line of said NE 1/4, to the Point of Beginning; thence continue North 89° 54′ 00" East 969.02 feet along said North line of the NE 1/4, to the Northeast corner of the N 1/2 of the NW 1/4 of said NE 1/4; thence run South 0° 47′ 27" East 660.04 feet, to the Southeast corner of said N 1/2 of the NW 1/4 of the NE 1/4; thence run North 89° 53′ 58" West 125.02 feet along the South line of said N 1/2 of the NW 1/4 of the NE 1/4; thence run South 0° 47′ 27" East 110.01 feet; thence run North 89° 53′ 58" West 421.70 feet; thence run South 12° 22′ 00" East 660.48 feet; thence run South 77° 38′ 00" West 287.70 feet, to a point of curvature of a curve to the right; thence along the arc of said curve to the right, having a radius of 2660 feet and a central angle of 22° 43′ 00", run Westerly 1054.64 feet, to a point of tangency; thence run North 79° 39′ 00" West 286.14 feet along the tangent extended, to a point of curvatur of a curve to the left; thence along the arc of said curve to the left, having a radius of 1140 feet and a central angle of 22° 46′ 00" run Westerly 452.93 feet; thence run North 12° 25′ 00" West 225.46 feet along a line radial to the last described curve, to a point of curvature of a curve to the right; thence along the arc of said curve to the right, having a radius of 380 feet and a central angle of 67° 38′ 00", run Northwesterly and Northeasterly along the tangent extended, to a point of curvature of a curve to the left; thence along the arc of said curve to the left, having a radius of 205 feet and a central angle of 42° 14′ 00", run Northeasterly 151.11 feet; thence run South 77° 01′ 00" East 25

feet along a line radial to the last described curve; thence run North 12° 59′ 00" East 122.39 feet, to a point of intersection with the arc of a curve running Easterly to the right, a radial at said point bearing South 4° 36′ 47" West; thence along the arc of said curve to the right, having a radious [*sic*] of 2090 feet and a central angle of 5° 44′ 13", run Easterly 209.27 feet, to a point of tangency; thence run South 79° 39′ 00" East 286.14 feet along the tangent extended, to a point of curvature of a curve to the left; thence along the arc of said curve to the left, having a radius of 1710 feet and a central angle of 20° 19′ 32", run Easterly 606.62 feet; thence run North 12° 22′ 00" West 250.12 feet, to a point of curvature of a curve to the right; thence along the arc of said curve to the right, having a radious [*sic*] of 320 feet and a central angle of 36° 22′ 00", run Northeasterly 203.11 feet to a point of reverse curvature; thence along the arc of a curve to the left, having a radius of 200 feet and a central angle of 35° 14′ 20" run Northerly 123.01 feet, to the Point of Beginning.

Said lands situate in Broward County, Florida.

A-1 TO R-1D

A parcel of land in the N 1/2 of Section 24, Township 49 South, Range 41 East, being more particularly described as follows:

Beginning at the Northwest corner of the Northeast corner of said Section 24; thence run South 89° 54′ 00" East (on an assumed bearing) 351.38 feet along the North line of said NE 1/4, to a point of intersection with the arc of a curve running Southerly to the right, a radial at said point bearing South 78° 45′

40" West; thence along the arc of said curve to the right, having a radius of 200 feet and a central angle of 35° 14′ 20", run Southerly 123.01 feet, to a point of reverse curvature; thence along the arc of a curve to the left, having a radius of 320 feet, and a central angle of 36° 22′ 00", run Southerly 203.11 feet, to a point of tangency; thence run South 12° 22′ 00" East 250.12 feet along the tangent extended, to a point of intersection with the arc of a curve running Westerly to the right, a radial at said point bearing North 9° 58′ 32" West; thence along the arc of said curve to the right, having a radius of 1710 feet and a central angel of 20° 19′ 32", run Westerly 606.62 feet, to a point of tangency; thence run North 79° 39′ 00" West 286.14 feet along the tangent extended, to a point of curvature of a curve to the left; thence along the arc of said curve to the left, having a radious [*sic*] of 2090 feet and a central angle of 5° 44′ 13", run Westerly 209.27 feet; thence run North 12° 59′ 00" East 92.31 feet, to a point of curvature of a curve to the left; thence along the arc of said curve to the left, having a radius of 1450 feet and a central angle of 15° 42′ 09", run Northeasterly 397.39 feet, to an intersection with the North line of the NW 1/4 of said section 24; thence run South 89° 54′ 00" East 664.90 feet along said North line of the NW 1/4 to the point of beginning.

Said lands situate in Broward County, Florida.

A-1 TO R-4A

A parcel of land in the NE 1/4 of Section 24, Township 49 South, Range 41 East, being more particularly described as follows:

Beginning at the Southeast corner of the N 1/2 of the NW 1/4 of said NE 1/4; thence run North 89° 53′ 58" West (on an assumed bearing) 125.02 feet along the South line thereof; thence run South 0° 47′ 27" East 110.01 feet; thence run North 89 53′ 58" West 421.70 feet; thence run South 12° 22′ 00" East 717.23 feet, to a point of curvature of a curve to the left; thence along the arc of said curve to the left, having a radius of 345 feet and a central angle of 62° 14′ 00", run Southeasterly 374.73 feet, to a point of tangency; thence run South 74° 36′ 00" East 181.36 feet along tangent extended, to a point of curvature of a curve to the right; thence along the arc of said curve to the right, having a radius of 210 feet and a central angle of 52° 13′ 09", run Southeasterly 191.39 feet, to an intersection with a line 400 feet North of and parallel to the North right-of-way line of Canal C-13; thence run due East along said parallel line, to an intersection with a line 425 feet West of and parallel to the East line of said NE 1/4; thence run North 0° 47′ 15" West along said parallel line, to an intersection with the North line of the S 1/2 of the NE l/4 of the NE 1/4; thence run North 89° 53′ 58" West along said North line, to the Point of Beginning.

Said lands situate in Broward County, Florida.

A-1 TO C-1A

The South 400 feet of the West 1065 feet of the East 1165 feet of that portion of the NE 1/4 lying North of the North right-of-way line of Cancal [*sic*] C-13; in Section 24, Township 49 South, Range 41 East, Broward County, Florida.

A-1 to B-3

The West 325 feet of the East 425 feet of that portion of the South 3/4 of the NE 1/4 lying North of the North right-of-way line of Canal C-13; excepting therefrom the South 400 feet thereof, in Section 24, Township 49 South, Range 41 East, Broward County, Florida.

Section 2: The City Council of the City of Lauderdale Lakes does hereby determine that an emergency exists in regard to this ordinance and does waive the reading of said Ordinance on 2 separate dates and therefore this Ordinance shall take effect immediately.

ADOPTED at the regular meeting of the City Council of the City of Lauderdale Lakes July 12, 1966.

/s/ Edward Hepp
Mayor

ATTEST:

/s/ Audrey Tolle
City Clerk

ORDINANCE 548

AN ORDINANCE AMENDING SECTION 27-6 OF THE CODE OF ORDINANCES OF THE CITY OF LAUDERDALE LAKES; CONCOMITANTLY AMENDING SECTION 37.2 OF ARTICLE XXXVII OF THE BROWARD COUNTY ZONING CLASSIFICATIONS, RESTRICTIONS AND REGULATIONS EFFECTIVE JULY 17, 1973; PROVIDING FOR A REVISION TO CERTAIN PERMITTED USES; CONCOMITANTLY AMENDING SECTION 37.6 OF ARTICLE XXXVII OF THE BROWARD COUNTY ZONING CLASSIFICATIONS, RESTRICTIONS AND REGULATIONS EFFECTIVE JULY 17, 1973; PROVIDING FOR A REVISION TO CERTAIN YARD SET-BACK REQUIREMENTS; REPEALING ALL ORDINANCES IN CONFLICT; PROVIDING A SEVERABILITY CLAUSE; PROVIDING INCLUSION IN CODE; PROVIDING AN EFFECTIVE DATE.

WHEREAS, the Associate consulting Planner for the City of Lauderdale Lakes has conducted an investigation with respect to the commercial zoning scheme effective in the City of Lauderdale Lakes, as same relates to the residential zoning scheme of the City, and

WHEREAS, said Planner has advised that it would be appropriate to make certain amendments to the present zoning scheme of the City of Lauderdale Lakes, so as to preserve the health, safety and welfare of the citizenry of the City of Lauderdale Lakes whose residential accomodations [*sic*] are contiguous to commercially zoned properties, and

WHEREAS, the City Council, pursuant to City Ordinance 455, adopted by reference the Broward County Zoning Classifications, Restrictions and Regulations, effective July 17, 1973, as the Zoning Rules and Regulations of the City, and

WHEREAS, the City Council of the City of Lauderdale Lakes deems it advisable and in the best interest of the citizens of Lauderdale Lakes to revise the rules and regulations concerning the zoning scheme of the City of Lauderdale Lakes in accordance with the recommendations of the Associate City Planner.

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LAUDERDALE LAKES AS FOLLOWS:

Section 1. Amendment.

Article XXXVII, Section 37.2 of the Broward County Zoning Classification Restrictions and Regulations effective July 17, 1973, (adopted by reference) is hereby amended, as follows:

Section 37.2 USES PERMITTED

No building or structure, or part thereof, shall be erected, altered or used, or land or water used, in whole or in part, for other than one or more of the following specified uses;

1. Any use permitted in B-3 Zoning Districts, except as specified in Section 37.3, and as further limited by Section 37.6, hereof.
2. Sales and display of the following, except as limited by Section 37.6, hereof.
   Automobile secondhand parts (no wrecking)
   Agricultural implements
   Building supplies in a building
   Construction equipment
   Dairy supplies

Feed
Fertilizer
Fuel
Machinery
Monuments
Motorcyles
Pumps
Produce
Restaurant and hotel, supplies and equipment
Secondhand merchandise
Ship chandlery
Swimming pool supplies
Tractors
Welding equipment and supplies

3. The following service establishments, except as limited by Section 37.6, hereof.

Ambulance service
Animal hospital
Bookbinding
Boarding Kennel
Cleaning and Dyeing establishment
Carpet and rug cleaning
Crating, packing and shipping service
Distribution service and package delivery
Diaper service
Food catering
Fruit packing and shipping
Glass and mirror shop
Linen supply
Laundry
Milk distributing stations
Magazine wholesale agency
Mirror silvering
Printing, lithography and engraving
Soft drink bottling

4. The following repair and shop uses:
   Automobile paint shop
   Awning and canvas shop
   Battery repair and rebuilding
   Electrical repair shop
   Electrical contractor shop
   Furniture repair shop
   Household repair shop
   Plumbing shop
   Roofing contractor shop
   Restaurant and store fixture shop
   Sign painting shop
   Tire recapping and vulcanizing
   Upholstery shop

5. The following miscellaneous uses, except as limited by Section 37.6 hereof.
   Theatrical studio
   Trade and vocational school
   Transformer and electrical switching station
   Automobile body shop
   Boat building and repair, up to 45' length
   Cabinet and carpenter shop
   Heating contractor shop
   Sheetmetal shop
   Sign shop
   Tinsmith shop

6. Accessory uses and structures, except as limited by Section 37.6 hereof.

Section 2. Amendment.

Article XXXVII, Section 37.6 of the Broward County Zoning Classifications Restrictions and Regulations effective July 17, 1973, (adopted by reference) is hereby amended, as follows:

Section 37.6 YARDS

Every plot which is contiguous to a residentially zoned district, whether such plot be separated from said residentially zoned district by a street, alley, sidewalk, canal, lake, or other public open space or thoroughfare, shall be provided with either a yard setback of (100) one hundred feet in depth from the nearest boundary of such residentially zoned district; provided, that in determining such yard set-back, there shall be included the width of such street, alley, sidewalk, canal, lake or other public open space or thoroughfare, as applicable, or a 50 foot rear yard set-back whichever is greater.

Section 3. Amendment.

Section 27-6 of the Code of Ordinances of the City of Lauderdale Lakes is hereby amended to include the amendatory provision set forth hereinabove.

Section 4. Conflict.

All Ordinances or code provisions in conflict herewith are hereby repealed.

Section 5. Severability.

If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held invalid or unconstitutional by any Court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions of this Ordinance.

Section 6. Inclusion in Code.

It is the intention of the City Council of the City of Lauderdale Lakes that the provisions of this Ordinance, exclusive of Section 3 hereinabove, shall become and be made a part of the Code of Ordinances of the City of Lauderdale Lakes and that the Sections of this Ordinance may be renumbered or relettered and the word

"Ordinance" may be changed to "Section", "Article", or such other appropriate word or phrase, the use of which shall accomplish the intentions herein expressed.

Section 7. Effective Date.

This Ordinance shall become effective immediately upon its final passage.

PASSED ON FIRST READING IN FULL THE 12TH DAY OF JULY, 1977.

PASSED ON SECOND READING BY TITLE ONLY, THE 26TH DAY OF JULY, 1977.

ADOPTED AND PASSED BY THE CITY COUNCIL OF THE CITY OF LAUDEDALE LAKES AT ITS REGUALR [*sic*] MEETING HELD THE 26TH DAY OF JULY, 1977.

/s/ Mayor Howard Croft
MAYOR

ATTEST:

/s/ Audrey Tolle
CITY CLERK

ORDINANCE #549

AN ORDINANCE AMENDING PRIOR ZONING ORDINANCES; PROVIDING FOR THE REZONING OF CERTAIN REAL PROPERTY FROM A C-1 AND/OR C-1A ZONING DISTRICT TO A B-3 ZONING DISTRICT; PROVIDING FOR AN AMENDMENT TO THE OFFICIAL COMPREHENSIVE ZONING MAP TO REFLECT SUCH CHANGE IN ZONING DISTRICT; PROVIDING FOR NOTICE, BY MAIL, TO EACH REAL PROPERTY OWNER WHOSE LAND IS THE SUBJECT OF THIS RE-ZONING; PROVIDING FOR A PUBLIC HEARING; REPEALING ALL ORDINANCES IN CONFLICT; PROVIDING A SEVERABILITY CLAUSE; PROVIDING AN EFFECTIVE DATE.

WHEREAS, the Consulting City Planner has advised that certain real property is, in accordance with sound planning principle improperly zoned, and

WHEREAS, the City Council has determined that that certain real property, hereinafter described, is zoned in a manner which violates sound planning principles, inasmuch as such property would allow virtually unrestricted development on lands contiguous to residential zoning district and developments, and

WHEREAS, the City Council is desirous of re-zoning such property to bring the zoning thereof in conformance with sound planning principles and the practical necessities of land use, and

WHEREAS, Florida Statute Chapter 166, Section 166.041(3)(d) requires notification of property owners and a public hearing, prior to the enactment of such re-zoning law, and

WHEREAS, the City Council is desirous of directing such notification and for calling such public hearing prior to the adoption hereof,

NOW, THEREFORE:

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LAUDERDALE LAKES AS FOLLOWS:

Section 1. Notice

The City Clerk is hereby empowered and directed to notify, by mail, each real property owner of that certain real property hereinafter described, whose address is known by reference to the latest ad valorem tax record, and to state in such written notice the substance of this Ordinance as same effects such property owners and to advise such property owners of the time and place of the public hearing to be held with respect to the enactment hereof.

Section 2. Public Hearing

There is hereby called a Public Hearing to be held at 7:30 P.M. on the 16th day of August, 1977, in the chambers of the City Council, City Hall, Lauderdale Lakes, Florida, for the purpose of determining whether or not the real property described hereinafter should be re-zoned from a C-1 and/or C-1A zoning district to a B-3 zoning district. Thereafter, this Ordinances shall be adopted, if at all, on the 20th day of September, 1977. The Planning and Zoning Board shall conduct a Public Hearing concerning the proposed rezoning at a date to be decided on by the Board, provided that such date shall be not later than the 5th day of August, 1977.

Section 3. Rezoning; Amendment

That certain property described as:

> The South 400 feet of the West 1065 feet of the East 1165 feet of that portion of the NE 1/4 lying North of

the North right-of-way line of Canal C-13 in Section 24, Township 49 South, Range 41 East, Broward County, Florida.

is hereby rezoned from the existing zoning category applicable thereto, to wit: C-1 and/or C-1A to the B-3 zoning classification.

Section 4. Comprehensive Zoning Map Amendment

The Official comprehensive zoning map of the City of Lauderdale Lakes shall be revised to reflect the rezoning hereinabove described, and said change shall be initialed by the Chairman of the Planning and Zoning Board of the City of Lauderdale Lakes, the Mayor and the City Clerk, and said individuals shall also reflect on said zoning map the effective date of this Ordinance.

Section 5. Conflict

All Ordinances or code provisions in conflict herewith are hereby repealed.

Section 6. Severability.

If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions of this Ordinance.

Section 7. Effective date.

This Ordinance shall become effective immediately upon its final passage.

PASSED ON FIRST READING IN FULL JULY 12, 1977.

PASSED ON SECOND READING BY TITLE ONLY SEPTEMBER 20, 1977.

ADOPTED AND PASSED BY THE CITY COUNCIL OF THE CITY OF LAUDERDALE LAKES AT ITS REGULAR MEETING HELD SEPTEMBER 20, 1977.

/s/ Mayor Howard Croft
MAYOR

ATTEST:

/s/ Audrey Tolle
City Clerk

ORDINANCE #552

AN ORDINANCE PROVIDING FOR THE IMPOSITION OF A MORATORIUM ON THE ISSUANCE OF BUILDING PERMITS FOR ANY AND ALL NEW CONSTRUCTION IN A C-1 ZONING DISTRICT; PROVIDING FOR EXCEPTION; PROVIDING FOR A STUDY TO BE DONE; PROVIDING FOR A TEMPORARY TERM; REPEALING ALL ORDINANCES IN CONFLICT; PROVIDING A SEVERABILITY CLAUSE; PROVIDING AN EFFECTIVE DATE.

WHEREAS, the Planning and Zoning Board and the Consulting City Planner have each advised the City Council of the desirability of imposing a moratorium on the issuance of Building Permits in a C-1 zoning district for any and all new construction, in order that the Planning and Zoning Board in conjunction and cooperation with the Office of Consulting City Planner may determine the priority of the commercial zoning scheme of the City of Lauderdale Lakes, and

WHEREAS, the Planning and Zoning Board and the Consulting City Planner have each advised the City Council that there currently exists two parcels of real property zoned "C-1", both of which are contiguous to residentially zoned property, a juxtaposition of zoning district that defies sound planning principles and that such parcels of real property, so zoned, should be rezoned to a more restrictive business use so as to minimize the adverse effects which such business zoning will have on the value of the residential property, the health of the citizenry and particularly the welfare of the children residing in such residential neighborhoods, and

WHEREAS, on advice of the Planning and Zoning Board and the Office of Consulting City Planner, the city Council has determined that the commercial zoning scheme of the City should be reviewed and that during such review, no new construction should commence within the C-1 zoning districts,

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LAUDERDALE LAKES AS FOLLOWS:

Section 1. Moratorium

There is hereby imposed a moratorium upon the issuance of Building Permits for any and all new construction on all parcels of real property currently zoned under a C-1 zoning district; provided, however, that nothing herein contained shall be construed to prohibit the issuance of Building Permits for the repair and/or renovation of existing commercial structures on property currently zoned C-1.

Section 2. Study.

The Planning and Zoning Board, in conjunction and cooperation with the Office of Consulting City Planner, shall undertake a review of the zoning scheme of the City of Lauderdale Lakes and particularly all commercially zoned property which abuts residentially zoned property. As a result of such review, the Planning and Zoning Board shall prepare a report, including recommendations, of its findings as to whether or not residentially zoned property will suffer adverse effects as a result of being contiguous to property which is zoned under a C-1 zoning district category. Such report shall be submitted no later than the 60th day subsequent to the effective date hereof.

Section 3. Term.

This Ordinance shall become null and void on the 150th day subsequent to the effective date hereof, unless otherwise shortened or extended by act of City Council.

Section 4. Conflict.

All Ordinances or code provisions in conflict herewith are hereby repealed.

Section 5. Severability.

If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held invalid or unconstitutional by any Court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions of this ordinance.

Section 6. Effective Date.

This ordinance shall become effective immediately upon its final passage.

PASSED ON FIRST READING IN FULL THE 19TH DAY OF JULY, 1977.

PASSED ON SECOND READING BY TITLE ONLY THE 9TH DAY OF AUGUST, 1977.

ADOPTED AND PASSED BY THE CITY COUNCIL OF THE CITY OF LAUDERDALE LAKES AT ITS REGULAR MEETING HELD THE 9th DAY OF AUGUST, 1977.

/s/ Mayor Howard Croft
MAYOR

ATTEST:

/s/ Audrey Tolle
CITY CLERK

ORDINANCE # 568

AN ORDINANCE AMENDING SECTION 3 OF ORDINANCE 552 ADOPTED ON THE 9TH DAY OF AUGUST, 1997; PROVIDING FOR AN EXTENSION OF THE TERM OF THE MORATORIUM IMPOSED BY ORDINANCE 552 FOR A PERIOD OF ONE HUNDRED EIGHTY (180) DAYS, PROVIDING A SEVERABILITY CLAUSE; PROVIDING AN EFFECTIVE DATE.

WHEREAS, the City Council imposed a moratorium on the issuance of building permits on property zoned under a C-1 and/or C-1A zoning district, and

WHEREAS, the Planning and Zoning Board and the Consulting City Planner have recorded that the properties currently zoned C-1 and/or C-1A and contiguous to residentially zoned property be rezoned in a manner which will harmonize with the contiguous residentially zoned property, and

WHEREAS, it is the finding of the City Counsel that additional time is needed in order to act upon this written recommendation of the Planning and Zoning Board and the Consulting City Planner, and

WHEREAS, the City Counsel finds and determines that a legislative emergency exist for the reason that the term of the moratorium imposed pursuant to City Ordinance # 552 expired on the 6th day of January, 1978, and that there is a urgent need for restoration of such moratoriums on the issuance of building permits in a C-1 and/or C-1A zoning district;

NOW, THEREFOR, BE IT ORDAINED BY THE CITY COUNSEL OF THE CITY OF LAUDERDALE LAKES AS FOLLOWS;

Section 1: Amendment. Section 3 of the City Ordinance #552 duly adopted on this 9th day of August, 1997 is hereby amended to provide that such moratorium shall be extended through the 4th day of July, 1978.

Section 2: Ratification. In all other respects the material terms and provisions of Ordinance # 552 are hereby ratified.

Section 3: Severability. If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions of this Ordinance.

Section 4: Effective Date. This Ordinance shall become effective immediately upon its final passage.

PASSED ON FIRST READING IN FULL JANUARY 10, 1978.

PASSED ON SECOND READING BY TITLE ONLY UPON THE AFFIRMATIVE VOTE OF SIX COUNCIL MEMBERS WAIVING THE SECOND READING REQUIREMENT ON A WEEK SUBSEQUENT TO THE ADOPTION OF THE ORDINANCE HEREIN OF FIRST READING, ON EMERGENCY BASIS, THE 10TH DAY OF JANUARY, 1978,

ADOPTED BY THE CITY COUNSEL OF THE CITY OF LAUDERDALE LAKES, FLORIDA AT ITS REGULAR MEETING HELD THE 10TH DAY OF JANUARY. 1978.

/s/ Mayor Howard Croft
Mayor

Attest,

/s/ Audrey Tolle
City Clerk

Supreme Court, U.S.
FILED
APR 27 1999
OFFICE OF THE CLERK

No. 98-1428

In The

Supreme Court of the United States

October Term, 1998

HERMAN CORN, Trustee,

Petitioner,

vs.

THE CITY OF LAUDERDALE LAKES, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

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150PP

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STATEMENT OF THE CASE AND FACTS

Petitioner has reported a portion of the relevant facts accurately, but has omitted a number of items important for this court's review of the petition. Accordingly, while the facts cited by petitioner are accepted as correct to the extent they are presented, additional facts have been provided for this court's consideration.

A. The Disputed Property

Of the original 261 acres (purchased for less than $5,000 per acre by Herman Corn) annexed into the City of Lauderdale Lakes in 1966, only 8.5 acres are at issue (the Property). (App. B2, *Corn IV*; TR 57, 194).[1] While the majority of Corn's parcel was designated for residential or business development, the City was concerned about Corn's use of the Property and accordingly created a new zoning category, C-1A, for that specific portion of land. (App. D14, *Corn III*). The C-1A classification gave the City the right to control the use of the Property, so that anything developed on that land would first have to be approved by the City Council. (*Id.*)

Corn developed most of the 261 acres in accordance with his original development plan. (App. B2; *Corn IV*). While approximately $100,000 was expended by Corn in preparation of development, no portion of this sum was

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[1] References to the transcript of the trial proceedings before Judge Paine in the United States District Court for the Southern District of Florida (August 12-15, 1991) shall be designated "TR" followed by the appropriate page number.

directed specifically towards development of the Property. (*Id.*) In fact, Corn did not submit a preliminary site plan for the Property until 1976, some ten years after his development expenditures and the annexation of the 261 acres. (*Id.*)

Prior to that time, in 1975, the City retained the services of a planner to create a land use plan and certify its compliance with Broward County's Master Land Use Plan. (D14; *Corn III*). By law, all municipalities within Broward County had to be in compliance with Broward County's Master Plan by November of 1977. (TR 466, 526-527). That planner, Michael Shiff, recommended rezoning of the property in light of its juxtaposition to the residential portions of Corn's land. (*Id.*) The land was not rezoned at that time, however, insofar as no development was pending and it was assumed that the problem would be addressed in the final land use plan. (App. D15; *Corn III*).

In April of 1977, prior to the City Council's initiating any definitive action to rezone the Property, Corn submitted a preliminary site plan which called for the construction of a 67,000 square foot strip shopping center on the front portion of the property and a 900-unit, 103,000 square foot mini-warehouse storage facility on the rear portion of the subject property. (App. E2-3; *Corn v. City of Lauderdale Lakes*, 771 F.Supp. 1557 (S.D.Fla. 1991)).

The preliminary site plans submitted by Corn were reviewed by the City in the ordinary course of government. There were various meetings of the Planning and Zoning Committee wherein Corn's plans for development

were discussed. (TR 98). Ultimately, after various meetings and discussions with Corn, the Planning and Zoning Board eventually recommended on a 2-1 vote that Corn's preliminary site plan, as amended, be approved. (App. D16; *Corn III*).

The matter then came before the City Council for approval of the preliminary site plan, and was discussed at several City Council meetings. (App. D17-36; *Corn III*). Members of the Council and members of the community expressed concerns with the proposed development. (*Id.*). The specific concerns voiced were that the mini-warehouse development would adversely affect the property values of the residences across the canal, that it would destroy the residential character of the neighborhood, that it would adversely affect traffic in their neighborhood, that the peace and quiet of the neighborhood would be destroyed by trucks and vehicles coming to the warehouses in the early morning and late evening, and that it would represent a significant fire hazard. (*Id.*).

On July 12, 1977, approval of Corn's preliminary site plan again came up for vote after having been tabled on several prior occasions. (App. D24-34; *Corn III*). At that meeting, the City passed on first reading Ordinance No. 548 which eliminated, among other things, mini-warehouses as a permissible use under a C-1 zoning classification. (App. J12-17). The City also passed on first reading Ordinance No. 549 which rezoned Corn's land from C-1A to B-3. (App. J18-21). The ordinances were not enacted at that time. Public hearings were held on Ordinances Nos. 548 and 549; they actually became law in September of 1977. (App. D31; *Corn III*).

At a later meeting, on July 19, 1977, the City passed on first reading Ordinance No. 552 which called for a 150-day moratorium on construction on all C-1 property within the City boundaries. (App. D34; *Corn III*). This ordinance became effective on August 9, 1977. (App. J24). At the expiration of the 150-day period, the moratorium was extended for an additional 180-days by Ordinance No. 568, at which time it expired by its own terms. (App. J26-28).

The effect of this legislation was to prevent all construction on the subject property between August 9, 1977 and September 20, 1977. (App. J1-28). After September 20, 1977, Corn could build on the Property in any manner permitted by the B-3 business classification. (TR 234-36, 583; App. B3; *Corn IV*).

B. The State Court Litigation

Corn instituted state court litigation on August 11, 1977, challenging both the validity of Ordinances Nos. 548, 549 and 552 and the City's refusal to approve his preliminary site plans. (App. B4; *Corn IV*). He was ultimately successful, and the City was directed to approve Corn's preliminary site plans upon their resubmission with several modifications. (*Id.*) The basis for the judgment in favor of Corn at the state court level was the judge's finding that Corn had a vested right to the C-1A classification, thus estopping the City from changing that classification or denying Corn usage of the property in accordance with that classification. (App. H17). The City was therefore ordered to approve Corn's plans upon the correction of three deficiencies. (*Id.*)

The judgment of the state trial court was affirmed by Florida's Fourth District Court of Appeal in February 1983. (App. G1-11; 427 So.2d at 244). The appellate court found that although an owner of property typically acquires no vested rights in the continuation of existing zoning under Florida law, Corn had relied in good faith on the zoning and had made substantial change in the nature and contour of the land so as to equitably estop the City from a change in zoning. (App. G8-9).

The mandate of the Fourth District Court of Appeal was issued on March 4, 1983. (App. E5; 771 F.Supp. 1557 (S.D.Fla. 1991)). Corn did not resubmit a preliminary site plan which complied with the directives of the final judgment until October of 1983, a period of seven months following issuance of the mandate. (App. E5; 771 F.Supp. 1557). At that time, Corn was advised that it would be necessary for him to plat the property in order to comply with County, not City, requirements. (*Id.*). Corn then did nothing for a period of another year until he filed a Motion to Enforce Final Judgment in Broward County Circuit Court seeking a ruling that he did not have to comply with any County ordinances which were not in existence in 1977. (App. E4; 771 F.Supp. 1557). The action was unopposed by the City, and Corn obtained the ruling he desired. (TR 597). Despite having prevailed at the state court level, however, Corn elected to forego building the proposed project and instead proceeded with the federal litigation. (App. D3-4; *Corn III*).

C. The Federal Court Litigation

1. The District Court Litigation; *District Corn I*

Corn filed his federal action against the City in 1984, and the case proceeded to trial as a § 1983 action on Corn's claims that the City had taken his property without just compensation. (App. B5; *Corn IV*).[2] The district court found that the City had acted arbitrarily and capriciously and had deprived Corn of a constitutionally protected property interest and therefore had violated his substantive due process rights. (App. E21; 771 F.Supp. 1557 (S.D.Fla. 1991)). The court did not pass on the issue of whether Corn's Fifth Amendment rights had been violated. (App. E23; 771 F.Supp. 1557).

On the question of damages, the court reviewed the evidence presented by Corn and the City in light of the parameters set forth in *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347 (11th Cir. 1990). The court entered judgment in favor of Corn in the amount of $727,875.02. Corn, not satisfied with this amount, appealed the judgment as inadequate. The City cross-appealed the determination that it had violated Corn's Fourteenth Amendment substantive due process rights.

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[2] Corn had dismissed his procedural due process and equal protection claims, so that the only remaining counts at trial were those alleging violations of the just compensation and substantive due process clauses of the Fifth and Fourteenth Amendments, resepctfully.

2. The Eleventh Circuit Appeal; *Corn III*

The Eleventh Circuit opinion held that the trial court erred as a matter of law in its determination that the City had violated Corn's Fourteenth Amendment substantive due process rights and, consequently, reversed the finding of liability (App. D1; *Corn III*). Corn's claim that the trial court had erred in its damage determinations was rendered moot by the reversal. (*Id.*). Remand of the case was limited to the issue of whether Corn could prevail on his Fifth Amendment just compensation claim. (App. D57; *Corn III*).

3. Corn's First Petition for Writ of Certiorari

Corn filed his first Petition with this court in February, 1994, and attacked the Eleventh Circuit's findings with respect to his substantive due process claim. (App. K). This Petition was denied. *Corn v. City of Lauderdale Lakes*, 511 U.S. 1018 (1994).

4. the District Court Litigation; *District Corn II*

Upon remand, the district court addressed Corn's Fifth Amendment just compensation claim for the first time. The district court received additional legal argument from the parties in the form of written status reports, but received no additional evidence beyond that presented in the August 1991 bench trial. (App. C10).

The district court defined the legal issue presented as follows:

> CORN asserts through his just compensation claim that the impact of the CITY's invalid regulations effected a taking of his property interest in either the Subject Property or his proposed development. Therefore, the issue in this case is whether CORN's property (either his interest in the land or in the development project) has been taken without just compensation by virtue of the CITY's ordinances and action affecting each.

(App. C10).

Ultimately, the district court rejected Corn's just compensation claim with respect to both the mini-warehouse project and the Property. With respect to the former, the court found that Corn did not have a vested right to the development of his mini-warehouse project because the City had not issued a permit to Corn upon which he relied to his detriment, nor did Corn have a reasonable expectation in the unfettered development of the Property. (App. C17). The court further found that the ordinances did not effect a taking of the Property because Corn was never deprived of all "economically viable use" of the parcel. (App. C15).

5. The Eleventh Circuit Appeal; *Corn IV*

In *Corn IV*, the Eleventh Circuit disapproved of that portion of the district court's opinion finding that Corn did not have a vested right in the development of his project, noting that "the district court failed to consider the state court's holding that, under Florida law, Corn had acquired certain vested rights in the Project." (App. B16; *Corn IV*).

Despite this, the court affirmed the district court's rejection of Corn's just compensation claim, because regardless of Corn's vested rights in the project, the " 'private property' " subject to the Fifth Amendment's prohibition . . . does not include every single property interest recognized by law." (App. B16, *Corn IV*). Because Corn failed to show that he was deprived of all economically viable use of his Property, the court rejected Corn's claim for the period of time after the moratorium expired, but remanded to the district court for further factual findings as to Corn's just compensation claim during the moratorium period. (App. B21; *Corn IV*).

It was in this appeal, for the first time, that Corn raised the issue of whether the rough proportionality standard of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), would apply to his case. Specifically, Corn argued that the Eleventh Circuit in *Corn III* failed to apply the appropriate standard of review to his substantive due process claim, in light of this Court's later opinion in *Dolan*. (App. B9; *Corn IV* at n. 3). The Eleventh Circuit summarily dismissed this claim as "meritless, insofar as "*Dolan* did not address the type of substantive due process claim asserted by Corn." (*Id.* at App. B10).

6. Corn's Second Petition for Writ of Certiorari

Corn filed a second Petition for Writ of Certiorari, arguing the precise issues before the Court in his instant petition. (App. L). Notably, in that Petition, Corn again argued that the Eleventh Circuit erred in failing to apply the *Dolan* rough proportionality standard by virtue of its findings in connection with his substantive due process

claim. (App. L34-39). Corn's second Petition was also denied. *Corn v. City of Lauderdale Lakes,* 118 S.Ct. 441 (1997).

7. The District Court Litigation; *District Corn III*

On remand, the district court concluded that Corn was not denied all economically viable use of the Property during the moratorium because the moratorium ordinance was reasonable in its length and there existed economically viable uses of the property pursuant to the B-3 zoning classification. (App. A11). Accordingly, the district court entered final judgment in favor of the City and the individual council members.

8. The Eleventh Circuit Appeal; *Corn V*

In his most recent brief to the Eleventh Circuit, Corn abandoned all of his prior arguments and focused on the factual findings of the district court. (App. M). Specifically, Corn alleged that the City had judicially admitted that the moratorium applied to ban all building on the Property, and was therefore bound by these admissions. (App. M32-35). The Eleventh Circuit affirmed the district court's findings on a per curiam basis. (App. A1-2). None of the issues raised in *District Corn III* or *Corn V* have been addressed in the instant Petition, which is limited solely to the issues previously raised in Corn's prior Petition to this Court.

REASONS WHY THE WRIT SHOULD NOT ISSUE

I. THE WRIT SHOULD NOT ISSUE BECAUSE THE CIRCUIT COURT OF APPEALS' DECISIONS DO NOT CONFLICT WITH THE RULINGS OF ANY OTHER COURT AND ARE BASED ON THE APPROPRIATE LEGAL STANDARDS AS PREVIOUSLY ENUNCIATED BY THIS COURT.

A. Introduction

For the third time, petitioner seeks a ruling from this Court that would entitle him to just compensation simply by virtue of the state court's final judgment in his favor. Completely ignoring the Eleventh Circuit's findings with respect to the existence of a "taking," petitioner implies that a state court's equitable finding of vested rights is in the nature of a "physical invasion" of property and therefore a *per se* entitlement to just compensation. This untenable position is directly contrary to the established precedent of this Court, and has not been espoused by any other court in the nation. Insofar as petitioner is simply attacking the lower court's application of the law to the facts, and has not implicated any important federal question or confusion, certiorari should again be denied.

B. Whatever the nature of the "right" alleged by Corn, the courts below properly found that there had been no taking such that just compensation would be required

Throughout this litigation, Corn has consistently attempted to parlay the state court's determination that he had a vested right in the zoning classification of the Property into a *per se* taking within the contemplation of

the Fifth Amendment. This argument has necessarily required that Corn divert attention away from the "taking" aspect of the analysis, and focus on the existence of a constitutionally protected right. This isolated analysis begs the question, as Corn has never shown that he had a constitutional right to build the project he desired which was taken from him in contravention of the dictates of the Fifth Amendment.

In fact, compensable rights under the Fifth Amendment have repeatedly been defined by whether their deprivation denies the owner of all, or substantially all, economically viable use of the property as a whole. As this Court noted in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), a "taking" may not be established simply by showing that a party is denied the ability to exploit a particular property interest that the owner believed was available, calling such a suggestion "quite simply untenable:"

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with the rights in the parcel as a whole. . . .

Id. at 130-31.

The limited number of cases in which the deprivation of a right has automatically transferred into a deprivation of the property itself involve those rights so inherent in

property ownership that their deprivation alone constitutes a taking of the whole property. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (right to exclude others); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (same); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (same). In other words, they have involved "traditional" property rights, as opposed to the more peripheral interests asserted by Corn.

Even where such traditional rights are involved, however, there is no compensable Fifth Amendment taking where a balancing of the public interest involved and the property right affected will sustain the state's exercise of its regulatory power. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). To require compensation whenever the economic potential of property is affected "would effectively compel the government to regulate by purchase." *Andrus v. Allard*, 444 U.S. 51, 65 (1979). Where, as here, the regulation involved simply limits one portion of the rights retained by the property owner, a finding of a compensable taking is even less compelling. "At least where the owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.* at 65-66.

The Eleventh Circuit properly applied this analysis and found that the zoning ordinances in question did not rise to the level of a compensable taking. Corn was able, after a period of slightly more than a month, to build on the Propery in any manner permitted by the B-3 business classification. (TR 234-36, 583; App. B3; *Corn IV*). He simply chose not to do so, instead pursuing a ruling in state court that he could build the specific project he

initially desired. Corn had already profited substantially on the remainder of the parcel, and stood to profit on any development of the Property within the confines of the B-3 classification. Moreover, despite Corn's allegation that once the state court judgment enforced his "right" to build the mini-warehouse project it was economically infeasible, the district court explicitly found in its first judgment that Corn failed to prove this aspect of his claim. (App. E30; 771 F.Supp. 1557 (S.D.Fla. 1991)).

Corn's requested disposition in this case is logically insupportable. He concedes that property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984), *citing Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980), and *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). On the other hand, he fails to recognize that he never had the expectation of compensation for the right to build his mini-warehouse under state law. Instead, he tries to equate an equitable remedy with a traditional property right under federal Constitutional law, and thereby requests this Court to protect his conferred ability to build a mini-warehouse project in a way never contemplated by any state court.

C. *Dolan v. City of Tigard* still does not apply to a substantive due process claim, and may not be considered with respect to Corn's Fifth Amendment just compensation claim.

Corn once again raises the applicability of the *Dolan v. City of Tigard* rough proportionality standard to this

case, but fails to indicate the context in which he addresses this argument. To the extent that Corn is now attempting to challenge the Eleventh Circuit's just compensation analysis pursuant to the dictates of *Dolan*, he has failed to preserve this issue by raising it below and it should not be considered now. *See Husty v. U.S.*, 282 U.S. 694, 701-702 (1931); *Duignan v. U.S.*, 274 U.S. 195, 198-200; *Tennessee v. Dunlap*, 426 U.S. 312, 316, n. 3 (1976).

Moreover, as consistently argued by the City throughout the pendency of this litigation, *Dolan* simply does not apply to the substantive due process claim advanced by Corn. A substantive due process claim focuses not on the nature of the right allegedly "taken" by the legislative body, but instead turns solely on the propriety of the government's exercise of its police power. *Eide v. Sarasota Co.*, 908 F.2d 716, 721-722 (11th Cir. 1990). In other words, if the plaintiff is able to prove arbitrary and capricious action by the government, it is unnecessary to prove the destruction of value of the property right affected. *Id.*

The "rough proportionality" standard discussed in *Dolan* arises in the context of a Fifth Amendment just compensation claim only, as the required nexus to be established in determining whether the regulation at issue "substantially advances legitimate state interests," as a part of the broader takings analysis. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987). The analysis presupposes the existence of a constitutionally protected right that has been taken from the property owner:

> Without question, had the city simply required petitioner to dedicate a strip of land along

> Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred . . .

Dolan, 512 U.S at 384.

Conversely, *Dolan* distinguished the more traditional land use regulation cases such as the instant one:

> First, they [the land use regulations] involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.

Dolan, 512 U.S. at 385. The problem with Corn's attempts to apply *Dolan* to his case are that he has never adequately shown that he was deprived of a constitutionally protected property interest by the City. Instead, the factual findings of the district court have been that Corn suffered, at most, a limitation on one use of his Property for a short period of time.

Again, Corn desires a logical fallacy to dictate the result in this case. He wishes to separate the state court enforced right to enjoy the previous zoning classification of the Property from the value of the Property itself, and then merge the two once again to recover the full value of the Property by virtue of his isolated loss. Alternatively, he wishes to forego any proof of a loss of value or interest, and simply recover whatever dubious damages

he may on the basis of a rough proportionality standard measured in a vacuum.

This he may not do. Takings law has always required a delicate balance of the competing interests of the property owner and the government, and the lower courts' rulings in this case have appropriately applied the applicable legal standards to the facts of this case. Corn has failed to point to any court that embraces his theory of takings law, and has consequently failed to allege any basis for review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

DATED: April 27, 1999.

Respectfully submitted,

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APPENDIX K

No. 93-1308

In The

Supreme Court of the United States

OCTOBER TERM, 1993

HERMAN CORN, Trustee,

Petitioner,

vs.

THE CITY OF LAUDERDALE LAKES,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. (a) When a land owner, consistent with the directive of this Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), defers pursuing his federal constitutional and civil rights claims in a land use regulation controversy until a final adjudication of his state law-defined rights in property in the appropriate state court is reached, may a Federal Circuit Court of appeals ignore and override final factual findings and legal determinations made in the earlier state court proceedings (as well as the findings of the United States District Court consistent with the earlier final state court judgment) and purport to adjudicate that owner's rights to use his land as if a court of first instance?

(b) When such Circuit Court adjudication conflicts with the state court final judgment and the District Court factual findings, does that adjudication (1) defy this Court's holding in *Williamson County*, (2) violate the rights of that land owner to due process of the law, (3) contravene the constitutional doctrine of comity; (4) ignore federal law relating to full faith and credit (as well

as collateral estoppel and other doctrines of preclusion), and (5) improperly divest the District Court of its function as finder of fact?

2. (a) Where a landowner enjoys a fully vested right to build on his land in a City according to present zoning, confirmed by a final judgment of a state court of competent jurisdiction, which judgment also expressly estops the City from changing the zoning, may the City constitutionally deprive him of that right by a purported change in zoning?

(b) In this situation, when the City – in ostensible review of a site plan consistent with a development plan it has already approved (by state law, a nondiscretionary ministerial review limited to insuring technical site plan compliance) – nonetheless changes the zoning without notice, prehearing investigation or competent supporting evidence, thus depriving the landowner of his vested rights and preventing him from building, does that City deny the landowner due process of law and just compensation?

3. In *Eide v. Sarasota County*, 908 F.2d 716, 720 (9th Cir. 1990), *cert. denied* 498 U.S. 1120 (1991), the Eleventh Circuit first articulated a conceptual construct that there are precisely "four types of challenges [based on allegedly unconstitutional land use regulation] a plaintiff may bring . . . [1] just compensation, [2] due process takings, [3] arbitrary and capricious due process and [4] equal protection claims." This construct was the template of the Circuit Court's opinion below. Is this construct consistent with this Court's rule that challenges to the

constitutionality of land use regulations are to be determined on an ad hoc basis?

4. Does the Eleventh Circuit's explication of substantive due process rights in this case (and other land use cases) correctly explicate the law of this court, or are conflicting interpretations from other Circuit Courts of Appeal, and other state courts, correct?

5. What is the proper measure of damages for a temporary taking of property set aside for a particular authorized and appropriate development if, when development is unlawfully delayed and then finally permitted, the economic window of opportunity for that development has vanished?

PARTIES TO THE PROCEEDINGS

Plaintiff, appellant and cross-appellee, and petitioner is Herman Corn, Trustee, Defendants and respondents are the City of Lauderdale Lakes, a Florida municipal corporation (the City), Howard Craft (Mayor), Alfonso Gereffi, Jerome J. Cohan, Morris Klein, Lyman L. Allen, Louis Greenwald and Harry Kaufman (City Councilmen).

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PETITION FOR WRIT OF CERTIORARI

Herman Corn, Trustee, respectfully seeks Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The August 13, 1993 opinion of the United States Court of Appeals for the Eleventh Circuit is published at 997 F.2d 1369 (11th Cir. 1993), and is reproduced herein – with the subsequent order denying rehearing and a suggestion for hearing en banc – as Petitioner's Appendix A1-60.

That opinion affirmed in part and reversed in part the August 30, 1991 decision of United States District Court for the Southern District of Florida, published at 771 F.Supp. 1557 (S.D. Fla. 1991) and reproduced herein as Petitioner's Appendix B1-32. The subsequent District Court order awarding attorney's fees is at 794 F.Supp. 364 (S.D. Fla. 1992), and reproduced herein as Petitioner's Appendix C1-16.

Since the late 1960's the extended controversy to which these opinions speak has generated eight published opinions and a number of unpublished decisions, by state and federal courts. The remaining published opinions are: 371 So.2d 1111 (Fla. 4th Dist.Ct.App. 1975); 415 So.2d 1270 (Fla. 1982); 427 So.2d 239 (Fla. 4th Dist.Ct.App. 1983), reproduced herein as Petitioner's Appendix D1-11; 816 F.2d 1514 (11th Cir. 1987); and 904 F.2d 585 (11th Cir. 1990). A further order of the Eleventh

Circuit, reversing an award of attorney's fees to petitioner, is at 3 F.3d 442 (11th Cir. 1993). Orders of the Florida Circuit Court in and for Broward County dated January 28, 1970 and May 18, 1971 (with accompanying stipulation) are reproduced herein as Petitioner's Appendix E1-6.

JURISDICTION

This is an action for deprivation of property without due process of law or just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the Civil Rights Act (42 U.S.C. § 1983). The judgment of the Eleventh Circuit was entered on August 13, 1993. Mr. Corn's petition for rehearing and suggestion for a hearing en banc was denied on October 14, 1993. The federal court action for damages followed a state action culminating in a final judgment invalidating City ordinances 548, 549 and 552 and holding that the City had no discretion to act as it did – holdings recognized by the District Court, yet ignored by the Eleventh Circuit, which found the City's actions valid.

An extension of time within which to file this petition for a writ of certiorari to February 11, 1994, was granted by order of Justice Anthony M. Kennedy, Circuit Justice for the Eleventh Circuit, on December 29, 1993.

This court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

" . . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

"Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law . . . "

42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . "

City of Lauderdale Lakes ordinances nos. 103, 104, 105, 548, 549, and 552 are reproduced herein as Petitioner's Appendix F1-25.

STATEMENT OF THE CASE

A. Introduction

Twenty-eight years ago, in 1966, the subject 261 acres was annexed to the City of Lauderdale Lakes, to which it was contiguous, by means of an annexation agreement between the City and the property owner, Mr. Corn. The agreement, which included a development plan and site-specific zoning, was memorialized and implemented through City ordinances nos. 103, 104 and 105, enacted at the time of annexation.

Since 1969, controversies having their genesis in the City's efforts to thwart Mr. Corn's rights under the 1966 agreement (notably – but not exclusively – improvement of 8.5 acres of commercial development) have generated eight reported state and federal court decisions (identified *ante*), as well as several unreported decisions. Until the August 13, 1993 Eleventh Circuit Court of Appeals opinion inexplicably returned to square one to decide *de novo* issues previously and finally adjudicated in Florida state courts (as a matter of state law) and reaffirmed repeatedly in federal courts, the decisions have invariably required the City to adhere to its commitments and held (a) that Mr. Corn's rights to build on his land had vested under state law thus becoming protected property rights, (b) that the City lacked discretion to deny approval of the site plan, and (c) that the City was estopped from changing the existing zoning.

B. In 1966, Mr. Corn And The City Enter Into An Annexation Agreement That Included Approval Of A Development Plan And Site-Specific Zoning Consistent With That Development Plan

In 1966, the City and Mr. Corn agreed – after extended negotiations – to the annexation of his 261 acres (the Larger Site) located in an unincorporated area in Broward County, Florida, contiguous to the City. (771 F.Supp. at 1559-60; App. B1-2)[1] As is often the case, an intrinsic part of the annexation agreement was the City's

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[1] Without the cooperation of Mr. Corn, it would have taken an act of the Florida legislature or a formal referendum to enable the City to annex this land. Fla. Stat. Section 171 *et seq.*

approval of a proposed development plan – the *raison d'etre* for the annexation. All this was memorialized in ordinances adopted by the City on July 12, 1966. As the Eleventh Circuit put it in its earlier 1987 Opinion: "The ordinances, respectively, annexed Corn's property [No. 104]; applied a variety of zoning classifications to his land [No. 105]; and allowed Corn to construct mini-warehouses in a portion of his property zoned C-1A [No. 105]." (816 F.2d at 1515)[2] (Ordinance 103 created zoning category C-1A from pre-existing category C-1.)

C. A 1969 State Court Final Judgment Confirms Mr. Corn's Right To Build And Estops The City From Changing The Zoning On The Property

The next event of significance was thus recounted in a subsequent state court opinion:

> In 1969 the city attempted to change the zoning of a portion of appellee's property to prohibit a contemplated project [condominium housing] permitted by the original zoning. Litigation ensued resulting in a judgment holding that the city was estopped from changing the zoning. No appeal was taken from that judgment.

City of Lauderdale Lakes v. Corn, 427 So.2d at 240-41; App. D2. An examination of the January 28, 1970 order and

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[2] The 1966 ordinances did not identify "mini-warehouse" as the precise eventual use, but (in typical zoning terminology) expressly allowed any of several specified commercial and industrial uses, one of which was warehouse. (*See* 997 F.2d at 1371; App. A2-3)

May 18, 1971 final judgment (App. E2, 5), in context, demonstrates that the estoppel reference was to the entire Larger Site, including the 370 foot by 1030 foot 8.5 acres zoned C-1A (the Property) (TR 84).[3]

Between 1966 and 1977, Mr. Corn developed much of the Larger Site consistent with the approved development plan, logically developing the housing first. (771 F.Supp. at 1560; App. B2; TR 81) In reasonable reliance on the earlier approved development plan, he spent in excess of $100,000 toward development of the Property; improvements included waterways which formed a barrier between the Property and the residential parts of the Larger Site. (771 F.Supp. at 1560; App. B2)

D. Defying The State Court Estoppel Order And Reneging On Its Own Agreement, In 1977 The City Council Purports To Deny The Development It Had Approved At The Time Of Annexation And To Rezone The Property

1. The Mini-Warehouse Presents Mr. Corn With An Extraordinary Economic Opportunity

On April 1, 1977, Mr. Corn submitted a preliminary site plan for a 67,000 square foot shopping mall which would front the main adjoining thoroughfare (U.S. 411), and a 103,000 square foot mini-warehouse, separated from the thoroughfare by the mall and from surrounding

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[3] Another effort to renege on its 1966 commitments was launched by the City in 1976 (Circuit Court for the 17th Judicial District of Broward County, Florida case No. 76-7105). This, too, was resolved in Mr. Corn's favor.

residences by the waterways. (771 F.Supp. at 1560; App. B2-3) This site plan was (in the words of the final state court opinion) "in accordance with the development plan submitted to and approved by the City . . . " (427 So.2d at 241; App. D3)

At that time, small warehouses in which individuals might store personal property were just coming into vogue; there was no such facility in Lauderdale Lakes. (TR 3:500) Had the proposal been approved, this development – as subsequent experience of other entrepreneurs demonstrated – would have provided an exceptional business opportunity for Mr. Corn, and also provided a significant convenience for local residents.

2. City Council Actions, Which Overruled Planning And Zoning Board Recommendations, Were Taken Without Advance Notice, Investigations As To Their Appropriateness, Or Supporting Evidence

On May 12, 1977, the City's Planning and Zoning Board recommended approval of Mr. Corn's site plan; on May 27, 1977, it reaffirmed that recommendation. (771 F.Supp. at 1560; App. B3)

When it finally acted on the Corn site plan on July 12, 1977 (having tabled consideration of the matter three times), the City Council introduced and at the same meeting formally enacted two ordinances: Ordinance 548 eliminated warehouses as a permitted C-1A use, and Ordinance 549 rezoned the Property (and *no* other land) to B-3. (771 F.Supp. at 1560; App. B3, F12-21) These ordinances were passed without any advance notice to Mr.

Corn or to the public that any act beyond passing on the pending site plan would be considered. This ambush manifestly violated not only constitutional due process protections and basic fairness, but also the City's own duly enacted procedural standards: Lauderdale Lakes City Code § 25.5.5 requires a ten-day notice and a Planning and Zoning Board hearing on any proposed zoning change before the City Council may act.[4] The Council then denied approval of the Corn site plan as inconsistent with the (newly) created zoning, with no suggestion that the site plan might be modified to make it acceptable. (771 F.Supp. at 1560; App. B3)

Prior to the July 12 hearing, the City had made no effort to investigate mini-warehouses to determine empirically their impact on traffic, noise, etc. (771 F.Supp. at 1560; App. B4; TR 3:500-02) At the hearing, the City Council proposed a moratorium (later formally adopted as Ordinance 552 and extended), ostensibly to study and evaluate the impact of C-1 zone uses, and particularly mini-warehouses. (771 F.Supp. at 1560; App. B3-4, F22-25) The study thus post-dated the zoning change it was supposed to justify.

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[4] At the federal district court trial, former City Mayor Howard Craft conceded that there was no notice, that there was no investigation prior to the hearing ("we never heard of mini-warehouses"), that the City did not consider its 1966 agreements, that this was the only time of which he was aware that the City Council did not follow a Planning and Zoning Board recommendation, and that the rezoning and use deletion was unprecedented in City history. (TR 3:470-71, 494-500, 507-09)

3. City Council Actions Were Taken In Response To Pressure From Neighborhood (NIMBY) Activists

It is undisputed that all of these 1977 City Council acts taken to frustrate Mr. Corn's vested rights were a response to political pressure by neighborhood NIMBY (the often-used acronym for "Not In My Back Yard") activists – ironically for the most part living in the housing. Mr. Corn had developed. (*See, e.g.*, 997 F.2d 1378-84; App. A19-34) These activists appeared in significant number, but – like the City itself – offered no sworn testimony or other cognizable evidence which could support the City's illegal rezoning (which, of course, would have been impermissible anyway in view of the state court judgment).

E. Mr. Corn In The State Courts: Vested Rights, Lack Of Discretion, And Illegality Of City Acts Are Confirmed In A Final Judgment

After these City acts, Mr. Corn sued the City and the City officials identified *ante* in the Circuit Court of the Seventeenth Judicial District in and for Broward County (Case No. 77-12955). (771 F.Supp. at 1561; App. B4) At that time (prior to this Court's decision in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987)), Florida categorically forbade money damages as a remedy for unconstitutional land use regulation, no matter how severe the consequences to the landowner. *See Corn*, 816 F.2d at 1517.

Following a trial, the trial court entered its final judgment on October 20, 1978, holding that the waterways and other improvements were made by Mr. Corn in express reliance on the approved development plan, that the City's July 12 actions were taken without notice, and that "Ordinances #548, #549 and #552 were enacted by the City improperly and not in accordance with the requirements of the City Charter." (427 So.2d 241; App. D4) The court specifically held that the City failed "to follow its own notice and procedure requirements (and did not make the requisite showing of compelling health, safety or welfare considerations. (427 So.2d at 242, App. D4) The City Council's action was found to be in direct response to the "demands" of the neighborhood activists "without consideration of the rights of the Plaintiff herein pursuant to the Ordinances of the City of Lauderdale Lakes." And finally, the court expressly held that the City was "estopped to deny Plaintiff's rights in [the original] zoning classification." (427 So.2d at 242; App. D5) and that ordinances 548, 549 and 552 were void and unenforceable. (App. D5) The Court's writ of mandamus directed the City to approve the site plan (upon the making of minor technical adjustments), and to issue the building permit. (427 So.2d 242; App. D5)

The trial court judgment was affirmed in all relevant particulars by the Florida Fourth District Court of Appeal on February 16, 1983.[5] *City of Lauderdale Lakes v. Corn*, 427

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[5] Along the way, a dispute arose as to whether the City would be required to post bond on appeal. This controversy was resolved in a published decision at 415 So.2d 1270 (Fla. 1982). The bonding controversy has no significance in this matter.

So.2d 239 (Fla. 1983) (App. D1-11). The court of appeal held that the City was estopped from changing the zoning (to do so would be "grossly unfair"), and that "no element of discretion remains" in the City to deny the site plan and the approval of the plat on the basis of controlling standards is described as "an administrative act" and "ministerial" (427 So.2d at 243-44; App. D9-10), that under Florida law the City's legislative powers were in no sense impinged (427 So.2d at 244; App. D10), that Mr. Corn's vested rights equitably estopped the City from changing the zoning, and that the City should be "held to the same standards of fair dealing that are applied to other entities." (427 So.2d at 244; App. D9-10) The Florida Court of Appeal issued its mandate on March 4, 1983, at which time the decision became final (771 F.Supp. at 1561; App. B5)[6]

F. Mr. Corn In The Federal Courts: Damages Awarded Based On Constitutional Violations

By the time the illegality of the City's acts of frustration had been definitively adjudicated (1985), Mr. Corn had been deprived of the use of the Property for eight years. The window of economic opportunity for the mini-warehouse project had been lost; other warehouse facilities in the area had preempted Mr. Corn's opportunity.

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[6] In spite of the mandate, the City refused to approve the site plan unless Mr. Corn complied with planning requirements (property platting) that came into existence after July 1977. (771 F.Supp. at 1561; App. B5) On March 26, 1985, the 17th Judicial Circuit Court ordered the City to issue the building permit without platting. (771 F.Supp. at 1562; App. B6)

The market was saturated. the Property remains vacant today.

On January 17, 1984, Mr. Corn filed the underlying case below in the United States District Court for the Southern District of Florida No. 84-6034-CIV, seeking damages for violation of the just compensation, due process and equal protection clauses of the Fifth and Fourteenth Amendments and the Civil Rights Act (42 U.S.C. § 1983). (771 F.Supp. at 1561; App. B5-6)

On October 22, 1985, the district court (Gonzalez, J.) dismissed the action believing it to be unripe under the *Williamson County* test. (771 F.Supp. at 1562; App. B7) In *Corn v. City of Lauderdale Lakes,* 816 F.2d 1514 (11th Cir. 1987), the Eleventh Circuit reversed, and (significantly) acknowledged the final state court ruling: "A final judgment rendered in Corn's favor estopped the City from rezoning the property during the pendency of Corn's ownership of it." *Id.* at 1515. The "property" thus referred to was, again, the entire Larger Site including the Property.[7]

On August 30, 1991, following a four-day nonjury trial, the District Court (Paine, J.) issued its opinion consisting of findings of fact, conclusions of law and extended damages calculations purportedly pursuant to the Eleventh Circuit standard expressed in *Wheeler v. City of Pleasant Grove,* 896 F.2d 1347 (11th Cir. 1990) (*Wheeler*

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[7] Having failed to demonstrate that Mr. Corn's action was unripe, the City flip-flopped and argued that it was overripe. But the district court held that the action was not barred by limitations or res judicata, and the Eleventh Circuit affirmed. *Corn v. City of Lauderdale Lakes,* 904 F.2d 585 (11th Cir. 1990).

IV). The district court's substantive factual findings echoed the state court final judgment, *e.g.*, the passage of critical ordinances on the first reading was without notice and without even an attempt at investigation of the appropriateness of the mini-warehouse use; "the City Council was motivated solely by an irrational desire to thwart CORN's plans." *Corn v. City of Lauderdale Lakes*, 771 F.Supp. at 1569; App. B22.

The District Court presented its conclusions of law in the frame of reference of the *Eide v. Sarasota County* construct. Significant conclusions include: (1) Corn enjoyed vested rights in the pre-July 12, 1977 zoning, and "[t]his issue, having been presented, fully litigated, and resolved in a prior suit between these parties, cannot be relitigated" (771 F.Supp. at 1566; App. B15); (2) Corn enjoyed a protected property interest under Florida law (771 F.Supp. at 1566; App. B15-16); (3) the City acted arbitrarily and capriciously in its actions in July 1977 and thereafter, including its so-called moratorium and report which "seems nothing more than an attempt at *post hoc* rationalization." (771 F.Supp. at 1569; App. B21-22).

G. Twenty-Four Years After The Annexation Agreement And Thirteen Years After Commencement Of Litigation Which Generated Seven Prior Reported Decisions, The Eleventh Circuit Goes Back To Square One, Ignores Prior Factual Determinations By Both State And Federal Courts As Well As Final And Preclusive Legal Findings, And Proceeds As If It Were Writing On A Clean Slate As A Court Of First Instance

This case reached the Eleventh Circuit for the third time following an appeal by Mr. Corn and a cross-appeal

by the City from the District Court's decision. Mr. Corn asserted error in the computation of damages under *Wheeler IV* and in the holding that the individual defendants enjoyed absolute immunity. The City sought to relitigate issues previously and finally decided by the Florida state courts (vested rights) and the Eleventh Circuit (statute of limitations).

The Eleventh Circuit panel, consisting of three judges who had participated in neither of the prior Circuit decisions, wrote as if it were a court of first impression, as if the state court proceedings had never happened or at least as if they had no legal effect, and usurped the District Court's function as trier of fact as well. The Opinion recites the basic state court determinations, but never attempts to reconcile them with its own squarely contrary conclusions, which include a finding that the July 17, 1977 rezoning was proper (no mention is made of the state court estoppel interdiction). (997 F.2d at 1371-72; App. A3-4)[8] Using as its conceptual framework the *Eide v.*

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[8] The Eleventh Circuit apparently saw its mission as not just resolving the discrete controversy presented to it, but also delivering a grand *pronunciamento* with broad impact:

> The district court's error reaches beyond the fisc of one Florida community and the merits of one case . . . More broadly, this case involves questions about how decision-making is allocated between a democratic institution, such as an elected city council, and the federal courts. It involves fundamental issues about the allocation of rights and powers within our constitutional system. (997 F.2d at 1373; App. A7)

The problem with this grandiose language is that the opinion does violence to the precise value it purports to espouse: the proper "allocation of rights and powers within our constitutional system."

Sarasota County template and focusing on substantive due process, the court found that the City had not abused its discretion on July 12, 1977 (997 F.2d at 1373-74, 1386; App. A8, 40) (in contrast to the state court ruling that the City had no discretion as a matter of state law), and that what the City Council did was legislative (997 F.2d 1392-93; App. A54) (in contrast to the state court ruling that it was administrative and ministerial).

The Opinion goes on at length about the neighborhood activist input, in effect acknowledging that it was the basis of the City's decision. (997 F.2d at 1377-87; App. A17-42)

REASONS WHY THE WRIT SHOULD ISSUE

A. The Startling August 13, 1993 Eleventh Circuit Opinion Runs Counter To Monolithic Constitutional, Statutory And Case Law And Threatens To Destabilize The Clearly Defined Mode Of Interaction Between Federal And State Trial And Appellate Courts

1. Striking At The Very Heart Of Federalism, The Eleventh Circuit Ignored Guiding Principles Of Full Faith And Credit, Comity, Preclusion And Due Process Of Law

No concept is more fundamental to the system of federalism than the motion that federal courts must yield to state court determinations of state law, and give full faith and credit to the final judgments of state courts. The City had it exactly right when it wrote in a March 21, 1984 (unsuccessful) Motion to Dismiss:

> In 1980, the Supreme Court of the United States held that issues actually litigated in a state court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the state where judgment is rendered. *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411 (1980).

What the City recognized as obvious, the Eleventh Circuit – which must have known better – chose not to recognize at all. Snubbing the Florida court system, the Eleventh Circuit found that the City's illegal acts were valid.

For more than a century, this Court has recognized that federal courts are bound by construction of state law by state courts. *See, e.g., Commercial Bank of Cincinnati v. Buckingham's Executors*, 46 U.S. 5 How. 317, 342-43 (1847). Moreover, under 28 U.S.C. § 1738, judicial proceedings of a state court "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." Thus, with a few exceptions not relevant here, matters finally determined in a state court of competent jurisdiction are not open for reexamination in a federal court. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 485 (1982).

This bedrock rule not only avoids duplicative litigation and enhances the stability of the law; it also promotes the comity between state and federal courts that is the "bulwark of the federal system." *Allen*, 449 U.S. at 95-96; *see also Kremer*, 456 U.S. at 478. The respect to a

state court final adjudication comity dictates is particularly important when a federal court reviews a situation, as here, where a party's rights are grounded in fully adjudicated state law. *See generally Younger v. Harris*, 401 U.S. 37, 44 (1971).

This concept, which speaks to basic due process of law, controls the relationship of federal and state courts in every substantive field. However, because of the procedure prescribed by this Court in *Williamson County* for "ripening" a land use regulation case, intellectual detours by federal courts such as here present have a particular potential for mischief in this area of the law.

2. The Eleventh Circuit Opinion Penalizes Land Owners Seeking Due Process And Just Compensation For Unconstitutional Land Regulation Who Follow The Procedural Dictates Of This Court

Williamson County holds that before a landowner may seek damages in federal court arising out of unconstitutional land regulation, he must first "seek compensation through the procedure the state has provided for doing so . . . [T]he State's action is not 'complete' in the sense of causing a constitutional injury 'unless or until the State fails to provide an adequate postdeprivation remedy for the property loss.' " *Id.* at 194, 195 (quoting *Hudson v. Palmer*, 468 U.S. 517, 532 n.12 (1984)). Thus, *Williamson County* compels a supplicant to litigate first in state court to "ripen" his cause before seeking damages in federal court. This is exactly what Mr. Corn did here. His reward

at the end of the trial for scrupulously following the procedure this Court prescribed: a Circuit Court of Appeal which simply ignored *at least* these state court findings:

- that Mr. Corn had acquired vested rights under Florida law to develop his property according to the existing zoning and approved 1966 development plan (427 So.2d at 243; App. D8-9);
- that the City lacked discretion under Florida law to change that zoning or to deny approval of the site plan (427 So.2d at 242-44; App. D6-10);
- that the City was expressly estopped by a final judgment from a Florida court of competent jurisdiction from changing the zoning (427 So.2d at 243; App. D9); and
- that ordinances nos. 548, 549 and 552 were void and unenforceable. (427 So.2d at 241-42; App. D5)

These final determinations of state law would have manifestly received collateral estoppel effect under Florida law. *Mobil Oil Corp. v. Shevin*, 354 So.2d 372, 374 (Fla. 1977); *R.D.J. Enters. Inc. v. Media Bank*, 600 So.2d 1229 (Fla. App. 1992). Under section 1738, they bind federal courts as well. *Allen*, 449 U.S. at 96 (issue preclusion or collateral estoppel applies in a § 1983 action); *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 80-81 (1984) (claim preclusion or res judicata applies in a § 1983 action).

Had the Eleventh Circuit been faithful to its comity obligations, it could not have reached the result it did.

While the District Court understood for the most part the limitations the prior proceedings placed on it,[9] the Eleventh Circuit did not. In view of the preclusive finding that Mr. Corn's rights were vested and the 1977 ordinances which forced the Property into idleness were invalid, liability for a temporary taking was established. *See Lucas v. South Carolina Coastal Comm'n*, 505 U.S. ___, 120 L.Ed.2d 798 (1992). The Eleventh Circuit had but one legitimate qustion [sic] to decide: how much monetary damages should be awarded to Mr. Corn. If the August 13 opinion is followed, landowners will be required to litigate liability in state court, only to face the pointless and duplicative task of doing so all over again in federal court. The horrendous extra burden this will place on litigants and the judiciary cannot be what this Court intended when it promulgated *Williamson County*.

3. The Eleventh Circuit Rode Roughshod Over District Court Factual Findings (Including Findings As To Motive And Intent) In Contravention Of The Well-Defined Allocation Of Power And Duties Between Federal Trial And Appellate Courts

This caption needs little elaboration. The Eleventh Circuit simply ignored findings of fact made by the District Court, which heard the evidence and observed the

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[9] The District Court made an "independent review of the evidence" as to whether Mr. Corn's substantive due process rights were violated, reaching the same result as the state courts. (771 F.Supp. at 1569; App. B21)

witnesses.[10] In its result-driven analysis, the Eleventh Circuit badly overreached, divesting the District Court of its allocated fact-finding powers.

B. In Contravention Of Mr. Corn's Vested Rights And An Established Body Of Constitutional Law, The 1977 City Council Made Decisions It Was Not Empowered To Make, Violating Its Own Required Procedures, And Made Them On Impermissible Grounds

1. By 1977, Mr. Corn's Rights To Build The Mall And Mini-Warehouse Were Vested; The City Was Bound By A State Court Final Judgment Estopping It From Changing The Zoning And Divesting It Of Discretion To Deny The Site Plan

A brief look at the City actions the Eleventh Circuit upheld demonstrates how far it wandered afield. At the time he went into the July 12, 1977 hearing, Mr. Corn enjoyed:

- a development plan approved by the City pursuant to the agreed annexation which entitled him to develop the mini-warehouse project;

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[10] For example, the District Court found that the City was "motivated solely by an irrational desire to thwart CORN's plans." (771 F.Supp. at 1569; App. B22) But it is axiomatic that findings as to motive and intent are factual, and uniquely within the purview of the trial court. *Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982). The testimony of Mayor Howard Craft (*see* n.4, *ante*) is alone sufficient to sustain this finding.

- vested rights under Florida law to so develop;[11]
- a state court final judgment that estopped the City from changing the zoning on the Property; and
- a City Council empowered only to conduct an administrative-ministerial review.

By all reason this should have made the site plan hearing a technical review of details. But the reality was otherwise.

2. Mr. Corn Was Ambushed By The No-Investigation, No-Notice, No-Due Process Extralegal Purported Zoning Change

In enacting the 1977 ordinances with no advance notice, the City not only ignored its own charter requirements, but also ignored the standards which "seem to be universally prescribed in all systems of law established

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[11] The definition of property interests and the determination whether a particular interest is a vested property right to which the protections of the United States Constitution attach are, of course, quintessentially questions of state law. *Preseault v. I.C.C.*, 494 U.S. 1 (1990); *Williamson County*, 473 U.S. at 184; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982); *Texaco, Inc. v. Short*, 454 U.S. 516, 525 (1982); *Wheeler v. City of Pleasant Grove*, 664 F.2d 99, 100 (5th Cir. Unit B 1981), *cert. denied*, 456 U.S. 973 (1982). As to Florida law, *see Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So.2d 10, 16-17 (Fla. 1976). A particularly insightful explication of the meaning of vested rights (rights "which cannot be interfered with or taken away without just comprensation") is found in *Nemmers v. City of Dubuque*, 716 F.2d 1194, 1197 (8th Cir. 1983).

by civilized countries."[12] *Twining v. New Jersey*, 211 U.S. 78, 110-11 (1908). Mr. Corn was blindsided: he had no real opportunity to prepare to be heard on the subject matter of any of the ordinances. And the curiously perverse procedure the City adopted of enacting the ordinance first and thereafter undertaking a study to justify the ordinance, not only (again) violated the City charter, but was disturbingly reminiscent of the command of the Queen of Hearts: "Sentence first – verdict afterwards." Carroll, *Alice in Wonderland*, Ch. 12.

As Mayor Craft testified (*see* p. 11 n.4, *ante*), the 1977 City Council paid no attention whatsoever to the solemn commitments the City made to Mr. Corn in 1966. The whole scenario could serve as a textbook prototype of what this Court has defined as constitutionally impermissible: frustration of "investment-backed profit expectations." *Williamson County*, 473 U.S. at 200.

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[12] The denial of notice and hearing, and the failure of the City to follow fair procedures – or even its own procedures – are matters traditionally considered under the rubric of procedural due process. But there is no conceptual reason they cannot be part of a pattern of arbitrary and capricious behavior that implicates substantive due process as well (the procedural due process claim for relief in this case was dismissed before the district court resolution). There is no clear delineation: "[T]he line between "procedure" and "substance" is hazy in the setting of the regulation of land uses." *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 468 (7th Cir. 1988). "Where, as here, the plaintiff alleges the denial of the process consists of an official's arbitrary action, a claim for violation of substantive due process is indistinguishable from a claim for violation of procedural due process." *Sierra Lake Reserve v. City of Rocklis*, 938 F.2d 951, 957 (9th Cir. 1991), *cert. granted and judgment vacated*, 113 S.Ct. 31 (1992), *on remand*, 987 F.2d 662 (1992).

The state court holding that the 1977 zoning change was illegal came as no surprise. Florida law unequivocally holds that when a city purports to change a zoning ordinance to defeat a permit application and site plan that would be approved under existing zoning, that City acts "arbitrarily, capriciously, discriminatorily and illegally." *City of Margate v. Amoco Oil Co.*, 546 So.2d 1091, 1093-94 (Fla. App. 1989).

3. Inappropriate Deference To Neighborhood (NIMBY) Activists At The Expense Of Constitutional Rights – The Basis Of The City's 1977 Actions Here – Is An Increasing And Critical Problem Needing Address By This Court

In its 1993 opinion, the Eleventh Circuit called *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1989), a "red cow," *i.e.*, a precise precedent. (997 F.2d at 1390 & n.2; App. A48) (It is not even close.[13] But the case at bench has one significant fact in common with

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[13] In *Greenbriar*, the landowner sought a change of zoning to enable a desired project as to which he had no right, vested or otherwise [*id.* at 1572, 1581]; here, Mr. Corn sought only to build according to a vested right under *existing* zoning. In *Greenbriar*, the City won below, thus getting the benefit of a favorable review standard; that should have inured to Mr. Corn here. The real "red cows" are *A.A. Profiles, Inc. v. City of Ft. Lauderdale*, 850 F.2d 1483 (11th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Southern Co-Op Development Fund v. Driggers*, 696 F.2d 1347 (11th Cir. 1983), *cert. denied*, 463 U.S. 1208 (1983); and *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. Unit B 1981) (*Wheeler I*). In each of these comparable vested rights-substantive due process appeals, the landowner (whose position was not as strong as Mr. Corn's here) prevailed.

Greenbriar: in both cases public officials abdicated their governmental powers in favor of NIMBY activists.[14]

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[14] The August 13 Opinion notes that "[i]n *Greenbriar* . . . the City's decision was based upon "political pressure" from citizen voters who turned out as a crowd to oppose the development." (997 F.2d at 1389; A46). This language from *Greenbriar* (881 F.2d at 1579) is quoted with approval:

> [N]othing is more common in zoning disputes than selfish opposition to zoning changes. The Constitution does not forbid government to yield to such opposition; it does not outlaw the characteristic operation of democratic . . . government, operations which are permeated by pressures from special interests . . . The fact "that town officials are motivated by parochial views of local interests which work against plaintiffs' plan and which may contravene state subdivision laws" . . . does not state a claim of denial of substantive due process." (997 F.2d at 1389; A47)

This harsh standard has drawn critical comment from within the Eleventh Circuit. In an acerbic (but finally obedient) opinion, one district judge wrote that *Greenbriar* "clearly stands for the proposition that elected officials who vote on zoning requests can act for purely political reasons, because partisan, political decision-making, even by unknowledgeable, close-minded politicians . . . is automatically deemed rational and, therefore, cannot be arbitrary and capricious unless it is the product of corruption . . . The only limitation appears to be that there be no forty pieces of silver . . . Anything goes! . . . [T]he *Greenbriar* answer . . . simply says, 'THAT's politics!'." *Church of Jesus Christ of Latter-Day Saints v. Jefferson County*, 721 F.Supp. 1212, 1214-16 (N.D. Ala. 1989) (emphasis in original).

Something is disturbingly amiss in the Southeast United States: obeisance to NIMBY activists is proliferating like kudzu.

There is virtually no dispute on this point:[15] the only question is as to the propriety of the abdication.[16]

This problem may be more severe in the Eleventh Circuit than elsewhere, but it approaches crisis proportions throughout the country. It is the subject of a 1990 presidential report by the Advisory Committee on Regulatory Barriers to Affordable Housing, *"Not In My Back Yard" Removing Barriers to Affordable Housing*. Slogans tend to be highminded; the reality behind the acronyms is often no more than social or economic self-aggrandizement. There is every incentive in this situation for public officials – often motivated by nothing more exalted than a desire to perpetuate themselves in office – to count noses and pander. If a court overturns a decision (and they

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[15] The concurring opinion of Judge Hatchett (997 F.2d at 1393-94; App. A57-58) is revealing. It makes but one point, and makes it repeatedly: "nothing in the opinion should be interpreted as creating a new rule of law that developers will always be unsuccessful in stating a substantive due process claim when a large number of citizens oppose a land use proposal"; "we do not hold that local governments will always prevail in defending substantive due process claims whenever their zoning decision follows public meetings where citizens express general welfare concerns" (997 F.2d at 1393, 1394; App. A57-58). Why was this concurrence necessary? Precisely because the majority opinion, fairly read, seems to do precisely what the Judge Hatchett said it did not do; make NIMBY protestation, no matter how self-serving or irrational, a sufficient basis – *in itself, without more* – for land use decisions.

[16] To bolster its conclusion that the NIMBY opposition was a good and sufficient basis for the 1977 City acts, the Eleventh Circuit called the unsworn opinions and idiosyncratic concerns of the activists "evidence" and "facts." (997 F.2d at 1386; App. A38-39)

rarely do), the officials are personally absolved of responsibility. In the process, constitutional safeguards take the hindmost.

The most instructive precedent of this Court is *Washington ex. rel. Seattle Trust Title & Trust Co. v. Roberge*, 278 U.S. 116 (1928). Striking down a zoning ordinance that made operation of a "philanthropic home for children or for old people" contingent on approval of two-thirds of neighbors living within a specified radius as an invalid delegation of power and a violation of the due process clause (*id.* at 118), this Court held (*id.* at 121):

> The right of the trustee to devote its land to any legitimate use is property within the protection of the Constitution.

What happened below is uncomfortably close to *Roberge* redux, only worse: it lacks *Roberge's* statutory framework.[17]

Mr. Corn does not suggest that barriers be placed before citizens wishing to appear before a governmental body and thus directly participate in the political process. This is a cherished American tradition; the right to be heard – even when speaking from misinformation or self-

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[17] Also instructive is *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985) (a city may not avoid the strictures of the Constitution "by deferring to the wishes or objections of some fraction of the body politic"). *See also Marks v. City of Chesapeake*, 883 F.2d 308, 310-12 (4th Cir. 1989). Florida state law is consistent that public opposition is not a sufficient basis for zoning decision. *Bailey v. City of St. Augustine Beach*, 538 So.2d 50, 52 (Fla. App. 1989); *BML Investments Inc. v. City of Casselberry*, 476 So.2d 713 (Fla. App. 1985).

interest – must be preserved. But this Court needs to remind regulators that there is a "sanity check"; officials must not yield to public pressure when constitutional rights are at risk.

C. The Eleventh Circuit *Eide* Construct, Central To the [sic] Disposition Of This Case Below, Is Inconsistent With The Teachings Of This Court, And Requires Litigants Challenging Land Use Regulations To Operate Under A Set Of Rules Different From Those In Other Circuits

In *Eide v. Sarasota County*, 908 F.2d 716 (9th Cir. 1990), the Eleventh Circuit unveiled a construct for resolution of constitutional challenges to land use regulations. The Court noted that the required threshold step was "determining what type of claim Eide is making," and then pronounced that there were precisely "four types of challenges [based on allegedly unconstitutional land use regulation] a plaintiff may bring . . . [1] just compensation, [2] due process takings, [3] arbitrary and capricious due process and [4] equal protection claims." *Id.* at 720.

Since *Eide*, this construct has been used pervasively in the Eleventh Circuit, at both trial and appellate levels. *See, e.g., Rearhard v. Lee County*, 968 F.2d 1131, 1134-35 (11th Cir. 1992). It was the matrix for the decision below; the construct is repeated at 997 F.2d 1373-74 (App. A 7-9).[18]

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[18] The Eleventh Circuit construct has been referred to, to Mr. Corn's knowledge, in only one other circuit: it is mentioned as unhelpful in a district court opinion (*Pearson v. City of Grand*

This Court has, of course, adopted its own quite different approach:

> [W]e have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." (citations)
>
> In engaging in these essentially ad hoc, factual inquiries . . .

Penn Central Trans. Co. v. City of New York, 438 U.S. 104, 124 (1978).[19]

This Court's ad hoc, fact-focused construct posits an almost infinite variety of situations; the Eleventh Circuit posits but four rigid categories. The problem with the kind of categorization exercise the Eleventh Circuit attempted, however intellectually nimble in the abstract,

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Blanc, 756 F.Supp 314, 318 (E.D. Mich. 1991)), and as helpful in the Sixth Circuit affirmance of that opinion (*Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1215-16 (6th Cir. 1992)).

[19] *See also Concrete Pipe & Prods., Inc. v. Construction Laborers Pension Trust*, 113 S.Ct. 2264, 2290 (1993); *Lucas*, 112 S.Ct. at 2893; *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 349 (1986); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986). As this Court emphasized in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), while ad hoc considerations control these cases, "the inquiry is not standardless. The economic impact of the regulation, especially the degree of interference with investment-backed expectations, is of particular significance."

is that categorization inevitably means exclusion.[20] There is, for example, no really appropriate place in the Eleventh Circuit template for vested rights. This fact worked adversely to Mr. Corn in this case; the construct had no capacity to recognize the superior status that state-court adjudicated vested property rights enjoy in the hierarchy of protected interests.

The *Eide* construct does not express the test this Court has established. It imposed upon Mr. Corn, and will impose upon future Eleventh Circuit landowner-litigants, a straight-jacket landowners in other circuits will escape.

D. This Case Presents A Vehicle For Resolving The Significant Conflict Which Exists Between The Several Circuits (And Between Federal And State Courts) As To The Breadth Of Substantive Due Process Guarantees In Land Use Cases

The substantive due process analysis in the August 13 opinion (997 F.2d at 1374-76; App. A9-13) did violence to logic and precedent in a number of ways.[21] *First*, it ignored Eleventh Circuit precedent that where a City act

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[20] In *Eide*, 908 F.2d at 724-25 n.15, the Eleventh Circuit gently chided this Court for failing to make clear into which of the four available pigeonholes one of its cases (*Pennell v. City of San Jose*, 485 U.S. 1 (1988)) fits.

[21] The district court found liability under substantive due process. Since the measure of damages under this theory is the same as under a takings claim (*Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 270 n.3 (11th Cir. 1987) (*Wheeler III*)) the district court did not try the inverse condemnation claim; it was remanded by the Circuit. (997 F.2d at 1393 & n.3; App. A56-57)

is *illegal*, as were the zoning change and site plan denial here, such act as a matter of law cannot "bear a substantial relation to the public health, safety, morals or general welfare." (997 F.2d at 1374; App. A10) *See, e.g., AA Profiles*, 850 F.2d at 1488. *Second*, one of the prongs of the test applied was "whether the deprivation . . . is the result of an abuse of governmental power sufficient to raise an ordinary tort to the stature of a constitutional violation." (997 F. 2d at 1374; App. A9) This suggests that the court misperceived what was before it; a constitutional land use regulation claim which implicates the exercise of the state's inherent police power and a self-executing Constitutional provision, and does not sound in tort. *See, e.g., Reardon v. San Francisco*, 66 Cal. 492, 505 (1885).[22] *Third*, the Eleventh Circuit failed to factor in the vested rights and preclusive ruling aspects of the case. The fact significant to this Court is that the analysis bore scant resemblance to the substantive due process analysis this case would have received in other circuits or state courts throughout the land.

The Sixth Circuit opinion in *Pearson v. City of Grand Blanc* contains a circuit-by-circuit review of substantive due process land use law. (961 F.2d at 1217-20) According to *Pearson*, the Third and Fourth Circuits are somewhat more sensitive than others to landowner rights, the Ninth and Eleventh Circuits are essentially congruent in

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[22] "[I]t is not a tort for government to govern . . . " (*Dalehite v. United States*, 346 U.S. 15, 57 (1952) – even if that governance takes private property. Whether just compensation is payable is "an entirely separate question." *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979).

approach (open to some question in view of the Eleventh Circuit construct), the Eight [sic] Circuit decisions are in such internal disorder that there is no ascertainable circuit position . . . and so on. The Sixth Circuit's own test is extremely draconian; it will interfere in zoning abuse cases only when such abuse is so extreme that it "shocks the conscience." *Id.* at 1222. With respect, the "shocks the conscience" standard shocks the conscience; the right of a citizen to receive rights guaranteed by the Constitution should not be captive to the subjective emotional response of a jurist.

Pearson also stresses that federal courts are typically much more deferential to public entities in substantive due process challenges than state courts. *Id.* at 1221-24. There seems to be little rational basis for this dichotomized hierarchy of protection, particularly when state courts are often called on to determine and enforce rights under the United States constitution.[23] The *Pearson* court concluded:

> We wish it were within our power to harmonize these decisions, but the conflicts among circuits are too great. *Harmony will have to await action by the Supreme Court. Id.* at 1220 n.45. (Emphasis added)

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[23] *Pearson* suggests that a linchpin of the various analyses is whether the critical decision is legislative (high deference) or quasi-judicial, administrative, or ministerial (less deference). In the case at bench, of course, the Eleventh Circuit somehow saw the challenged acts as legislative, even though the preclusive state court rulings held them to be administrative and ministerial. No reason appears why a federal court should be telling a state how to categorize its own governmental decisions.

The quantum of federal constitutional protection a citizen enjoys should not depend on the serendipity accident of geographical location. The case at bench extends as opportunity to cure the pervasive conflicts and conceptual confusion in the application of substantive due process law to land use cases.

E. This Court's Guidance Is Needed In Resolution Of The Recurring Question Of The Proper Measure Of Damages In A Land Use Case Where An Economic Opportunity Is lost Because Of A Temporary Taking

In 1977, when Mr. Corn went before the City, he was on the brink of an exceptional economic opportunity: ownership of the first mini-warehouse in the Lauderdale Lakes area. When the dust settled in 1985, and he was legally empowered to pursue that project, the window of opportunity was gone: the relevant market was saturated.[24]

In context, the related issues are: Where lawless government acts cause the economic feasibility of a contemplated project to be lost forever, does the temporary taking become permanent (Mr. Corn's position below)? If

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[24] As noted *ante*, this question was presented to but not addressed by the Eleventh Circuit, since unaccountably it returned to square one on the liability issue. The District Court spoke to the proper measure of damages for the partial and temporary taking (771 F.Supp. at 1570-71; App. B23-26), and Mr. Corn presented the issue to the Eleventh Circuit at pp. 40-43 of his Opening Brief, and p. 15 of his Brief of Cross-Appellee and Reply Brief For Appellant (question is what damages apply "[i]f by the time the regulations which effected a temporary taking are set aside the confiscated project is no longer feasible)."

not, how may compensation reflect not only the temporary loss of use but the fact that the land may be worth but a fraction of what it was prior to the regulatory freeze? Is an owner required somehow to attempt to mitigate damages by seeking to build consistent with the less desirable zone classification he is challenging (which would render any ultimate vindication pyrrhic)? And where the owner is freed to build part of an integrated project (here the mall) before he is able to develop the remainder, must be proceed with such partial development even though piecemeal construction is economically contra-indicated?

There is some law from lower courts that is helpful, typically only by analogy. *See, e.g., Benenson v. United States*, 548 F.2d 939 (Ct. Cl. 1977). But this Court has not spoken to these recurring problems. Its address would insure fairness and uniformity, and effect a significant saving of time and judicial resources.

CONCLUSION

This case offers almost an embarrassment of certiorari-worthy issues. They engage in very fabric of federal law and speak to the relationships – largely grounded in the United States Constitution – on which that system is based: the relationship of federal courts to state courts, of trial courts to appellate courts, of the judiciary to local governments and of the several institutions of governance to the rights secured in the constitution. The Eleventh Circuit ignored the principles underlying these relationships and ran roughshod over the rules that embody those principles.

The individual right at the center of this controversy is the "personal right in property . . . That rights in property are basic civil rights has long been recognized." *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972). This Court has reaffirmed the primacy of that right this term, identifying as "an essential principle" the fact that "[i]ndividual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, ___ U.S. ___, 114 S.Ct. 492, 505 (1993). Regulating authorities and reviewing courts need to be reminded to stop trifling with the constitutional rights of citizens in the name of political expediency.

It has been almost a decade since this court spoke in *Williamson County*. This petition offers an appropriate vehicle to resolve the recurring problems raised in its aftermath.

DATED: February 11, 1994.

Respectfully submitted,

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APPENDIX L
QUESTIONS PRESENTED

1. Does a landowner have a constitutionally protected property interest in a vested right to build a specific project on land, which pursuant to state law the city is estopped from thwarting, so that the landowner is entitled to just compensation pursuant to the Fifth Amendment for the city's confiscation of his vested right?

2(a). Does a landowner who has vested rights to develop a specific project suffer the loss of all use of his land during the pendency of state litigation through which the landowner establishes his vested rights and the city's obligation to approve the project?

2(b). Even if the land can be developed for alternate uses, must the landowner develop his land for any such use during the pendency of the state litigation and thereby moot his state claim, abandon his vested right and forfeit his constitutional right to obtain just compensation for the confiscation of his project?

3(a). Does a city commit a compensable taking of property pursuant to the Fifth Amendment when it wrongfully prevents development of land through invalid regulation comprised of the enforcement of invalid ordinances and the administrative rejection of a site plan it lacks discretion to deny, since the city's invalid action can never substantially advance any legitimate state interest?

3(b). Does the rough proportionality analysis of *Dolan v. City of Tigard*, 512 U.S 374 (1994), apply to a city's administrative exaction of a landowner's constitutionally

protected vested right to build a specific project as a condition to the landowner's development of his land?

PARTIES TO THE PROCEEDING

Plaintiff, Appellant and Petitioner is Herman Corn, Trustee ("Corn").

Defendants and Respondents are the City of Lauderdale Lakes, a Florida municipal corporation (the "City"), Howard Craft ("Mayor"), Alfonso Gereffi, Jerome J. Cohan, Morris Klein, Lyman L. Allen, Louis Greenwald and Harry Kaufman (collectively the "City Councilmen").

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Sakolsky v. City of Coral Gables, 151 So.2d 433, 436 (Fla. 1963) 17

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Ordinance No. 568 ..... 3, 8

Text

D. Mandelker, Land Use Law, The Zoning Process § 6.12, at 214 (1988) 19

Hanes and Minchew, On Vested Rights For Land Use and Development, 46 Washington Law Review 373, 376 (1989) 19

OPINIONS BELOW

This Petition seeks review of the following opinions issued by the United States Court of appeals for the Eleventh Circuit:

1. *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066 (11th Cir. 1996) (*"Corn IV"*), and the Order Denying Rehearing and a Suggestion for Rehearing En Banc, included as Petitioner's Appendix A.

Corn IV affirmed in part, vacated and remanded in part the Findings of Fact and conclusions of Law Upon Remand of the United States District Court for the Southern District of Florida, ("Second final Judgment"), included as Petitioner's Appendix B.

2. *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369 (11th Cir. 1993), *cert. denied*, 511 U.S. 1018 (1994) (*"Corn III"*), and the subsequent Order Denying Rehearing and a Suggestion for Rehearing En Banc, included as Petitioner's Appendix C.

Corn III affirmed in part and reversed in part the August 30, 1991 decision of the United States District

Court for the Southern District of Florida, published at 771 F.Supp. 1557 (S.D. Fla. 1991) (the "First Final Judgment"), included as Petitioner's Appendix D.

In addition to the opinions identified above, this controversy has generated the following relevant published opinions and unpublished decisions, by state and federal courts:

a. *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir. 1990) (*"Corn II"*).

b. *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987) (*"Corn I"*).

c. *Corn v. City of Lauderdale Lakes*, 3 F.3d 442 (11th Cir. 1993).

d. *Corn v. City of Lauderdale Lakes*, 415 So.2d 1270 (Fla. 1982).

e. *Corn v. City of Lauderdale Lakes*, 427 So.2d 239 (Fla. 4th DCA 1983) (*"State Corn I"*), included as Petitioner's Appendix G.

f. *Corn v. City of Lauderdale Lakes*, 371 So.2d 1111 (Fla. 4th DCA 1975).

g. *Corn v. City of Lauderdale Lakes*, Case No. 77-12955, Broward County Circuit Court, Final Judgment ("State Court Final Judgment"), included as Petitioner's Appendix G.

h. *Corn v. City of Lauderdale Lakes*, Case No. 69-6229, Broward County Circuit Court, Orders on Summary Judgment, included as Petitioner's Appendix H.

JURISDICTION

This is an action for just compensation for the administrative taking of real property and the vested right to build a specific project without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the Civil Rights Act (42 U.S.C. § 1983). The judgments of the Eleventh Circuit were entered as follows:

1. *Corn IV* was entered on September 23, 1996. Corn's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on March 20, 1997.

2. *Corn III* was entered on August 13, 1993. Corn's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on October 14, 1993.

An extension of time within which to file this Petition for Writ of Certiorari to August 15, 1997, was granted by order of Justice Anthony M. Kennedy, Circuit Justice for the Eleventh Circuit, on June 6, 1997.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

> " . . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "Section 1 . . . nor shall any State deprive any person of life, liberty, or property without due process of law . . . "

42 U.S.C. § 1983:

> "Every person who, under color of any statute, ordinances, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . "

City of Lauderdale Lakes ordinances nos. 103, 104, 105, 548, 549, 552, and 568 are reproduced as Petitioner's Appendix I.

STATEMENT OF THE CASE

A. Introduction

This case presents takings issues which this Court has identified without resolving, which important questions have been incorrectly decided by the Eleventh Circuit.

Through this litigation Corn is seeking just compensation for the City's administrative confiscation of his vested right to develop a mini-warehouse/self-storage facility with an attendant strip shopping center (the "Project"), on an 8½ acre parcel of property (the "Property"). The City wrongfully prevented Corn from developing the

Project by rejecting Corn's preliminary site plan (the "Site Plan"), after illegally enacting ordinances rezoning and placing a moratorium on development of the Property and eliminating warehouses as an authorized use of land in the City. Before seeking just compensation in federal court Corn had successfully sued the City in state court, establishing that the offending ordinances were improperly enacted and that the City was estopped from enforcing the ordinances against the Property because Corn had a vested right to develop the Project. The state court found that the City lacked discretion and was required to approve the Site Plan and issue a building permit for the Project.

The state court litigation lasted almost eight years. Throughout this time the wrongful rejection of the Site Plan remained in effect, preventing Corn from developing the Project, thereby depriving him of all economically viable use of both his vested right to develop the Project and the Property.

Through the federal litigation Corn has unsuccessfully sought the recovery of just compensation for the confiscation of his constitutionally protected property interest in the Project and the loss of his use of his Property.

B. Pre-Litigation Background

The Property was part of a 261 acre tract (the "Tract"), acquired by Corn in 1966, when the Tract was located in unincorporated Broward County, and zoned

for agricultural use. (App. G-2, State Court Final Judgment[1]; App. D-1, First Final Judgment). Corn agreed to the annexation of the Tract into the City[2] in return for which the City approved Corn's development plan for the Tract. (App. A-2, *Corn IV*). Accordingly, ordinances were simultaneously enacted annexing the Tract into the City (Ordinance 104), zoning the property comprising the Tract for residential, commercial and industrial use, in accordance with Corn's development plan (Ordinance 105), and creating zoning category C-1A, an industrial zone which allowed warehouses, to apply to the Property (Ordinance 103). (App. D-2, First Final Judgment; App. A-2, *Corn IV*).

Corn expended in excess of $100,000 in reliance upon the City's annexation and zoning of the Property, developing the Property for C-1A use. (App. G-3, State Court Final Judgment; App. D-2, First Final Judgment). The Property fronted on a main thoroughfare on the east and was bounded by a canal on the south. (App. D-2, First Final Judgment). Corn constructed canals on the western and northern borders of the Property to create a buffer between the Property and the proposed residential areas, thereby fixing the dimensions of the Property at 370 feet wide, and 1,030 feet deep. (*Id.*).

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[1] The parties were collaterally estopped from relitigating the facts conclusively established in the State Court Final Judgment. *Allen v. McCurry*, 449 U.S. 90, 96 (1980).

[2] Without Corn's consent the City would have had to hold a formal referendum or secure an act of the Florida legislature to annex the Tract. Fla.Stat., Ch. 171, et seq.

Corn thereafter proceeded to develop the Tract in accordance with his original development plans and the zoning established by Ordinance 105, first building single family homes and condominiums. (App. G-2, State Court Final Judgment; App. D-2, First Final Judgment; App. A-2, *Corn IV*). In 1969 the City attempted to change the zoning of a portion of the Tract. (App. G-2-3, State Court Final Judgment). Litigation ensued resulting in a judgment holding that the City was estopped from changing the zoning. (App. F-2, *State Corn I*). The ruling of estoppel to change zoning was applicable to the entire Tract. (App. H-2, Order Granting Summary Judgment).

On April 1, 1977, Corn submitted the Site Plan to the City. (App. D-23, First Final Judgment). The Site Plan depicted the construction of the Project, including an approximate 103,000 square foot mini-warehouse situated in the rear of the Property, and an approximate 67,000 square foot shopping center across the front of the Property, between the main road and the mini-warehouse facility. (*Id.*)

The Site Plan was approved by the City's Planning and Zoning Board on two separate occasions. (App. G-9, State Court Final Judgment; App. D-3, First Final Judgment). The City Council tabled consideration of the Site Plan on three occasions, at which meetings residents living adjacent to the Property actively opposed the Project. (App. G-9-10, State Court Final Judgment). While residents raised "concerns" regarding the Project, no resident or member of the City presented any evidence supporting any of the expressed concerns. (App. D-3, 21, First Final Judgment). Indeed, each of the concerns had been considered by the City's Planning and Zoning Board, which

determined that the Site Plan complied with all of the City's regulations and ordinances regarding such matters. (App. G-7-9, State Court Final Judgment)

Ultimately, on July 12, 1977, the City acceded to the residents' vocal opposition to the Project. (App. F-4, *State Corn I*; App. D-22, First Final Judgment; App. C-2, *Corn III*). Without having conducted any investigation of mini-warehouses or study of whether there was any reason to rezone the Property, (App. D-4, 21, First Final Judgment), the City enacted Ordinance 549, which rezoned the Property from C-1A to B-3, a more restrictive category which did not permit warehouses, and Ordinance 548, which eliminated only storage warehouses as a permitted use in the C-1A zone. (App. D-3, First Final Judgment). This was the first time the City had considered rezoning the Property or changing the uses permitted within the C-1A zoning category. (*Id.*). The City did not afford Corn or anyone notice of its intention to enact these Ordinances. (App. F-4, *State Corn I*).

After enacting the Ordinances and based thereon, the City Council denied approval of the Site Plan. (App. G-12, State Court Final Judgment; App. D-3, First Final Judgment).

The City soon thereafter enacted ordinance 552, which imposed a 150 day building moratorium, prohibiting the issuance of building permits for the two parcels of C-1 property in the City, one of which was the Property (App. G-11, State Court Final Judgment, App. D-3, First Final Judgment). The moratorium was ostensibly enacted to evaluate the impact of C-1 zone uses on adjacent residential property. (App. I-22-25, Ordinance 552). The

Planning and Zoning Board's report was not submitted until December, 1977, months after the Property had already been rezoned B-3. (App. C-35, *Corn III*). The moratorium was extended by Ordinance 568, until July 4, 1978. (App. I-26, 27, Ordinance 568; App. D-4, First Final Judgment). (Ordinances 548, 549, 552, and 568 shall collectively be referred to as the "Ordinances").

The City's "purposeful action" prevented Corn from developing the Project. (App. C-13, *Corn III*).

C. The State Court Litigation – Corn Has Vested Rights in the Project and the City Must Approve the Site Plan.

Corn sued the City in state court, challenging the validity of the Ordinances and seeking to compel the City to approve the Site Plan. (App. D-4, First Final Judgment).[3] On October 20, 1978, the State Court Final Judgment was entered, ruling in favor of Corn. (App. G, State Court Final Judgment).

The trial court found that because Corn had both expended money and made substantial physical changes in the land in reliance upon the City's undertaking in adopting the original zoning ordinances, it was grossly unfair to permit the City to change the zoning of the Property. (App. G-14-15, State Court Final Judgment; App. F-5, *State Corn I*). The City's annexation and zoning

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[3] At the time Corn instituted the state court litigation Florida law did not afford a landowner the entitlement to recover money damages for the unconstitutional taking of property. *Corn I* at 1517.

of the Property and Corn's reliance thereon in preparing the Property for development conferred upon Corn vested rights in the zoning of the Property, and in the Project. (App. G-17, State Court Final Judgment; App. C-3, *Corn III*). As a result, the City was estopped from rezoning the Property and from denying approval of the Site Plan. *Id.* Further, the Ordinances were declared invalid for the City's failure to follow its own notice and procedural requirements for their passage. *Id.* The City had no discretion and was obligated to approve the Site Plan and issue a building permit for the Project upon Corn's correction of three technical deficiencies which the City had never afforded Corn the opportunity to correct. (App. G-12, State Court Final Judgment; App. F-5, *State Corn I*).

The City appealed the State Court Final Judgment. (App. F, *State Corn I*). The City's appeal served to stay enforcement of the State Court Final Judgment, so that the Ordinances and denial of the Site Plan remained in effect during the pendency of the appeal. (App. D-5, First Final Judgment). The State Court Final Judgment was affirmed. (App. F, *State Corn I*). The Florida appellate court issued its mandate on March 4, 1983, at which time the decision became final. (App. D-5, First Final Judgment).

Thereafter, Corn submitted a revised Site Plan to the City for approval, which the City refused to approve unless Corn complied with platting requirements that came into existence after July, 1977. (App. D-5, First Final Judgment). On March 26, 1985, the state court ordered the City to issue Corn a building permit without platting. (App. D-6, First Final Judgment).

Between June, 1977 and March, 1985, Corn was wrongfully prevented from developing the Project while he successfully litigated with the City in state court and established his vested right to build the Project. During the pendency of the litigation Corn did not develop the Property for any other use because he remained intent on developing the Property in accordance with his vested right to build the Project. By the time Corn succeeded in establishing his vested right to develop the Project changes in the area and the growth of competition in the intervening eight years had rendered development of the Project economically unfeasible.

Corn has unsuccessfully attempted to sell the Property since 1985. The Property is still owned by Corn and cannot be developed for any economically viable use.

D. Federal Court Litigation

On January 17, 1984, Corn filed the underlying action, seeking damages for violation of the just compensation, due process and equal protection clauses of the Fifth and Fourteenth Amendments and the Civil Rights Act. (App. D-5, 6, First Final Judgment). The jurisdiction of the district court was invoked under 28 U.S.C. §§ 1331 and 1343. The action was dismissed as unripe under *Williamson County Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). (App. D-7, First Final Judgment). The Eleventh Circuit reversed. (*Corn I*). The Eleventh Circuit later confirmed that Corn's claims were not barred by the statute of limitations or res judicata. (*Corn II*).

On August 30, 1991, following a four day non-jury trial, the district court issued the First Final Judgment,

ruling in favor of Corn on his "substantive due process takings claim".[4] The trial court concluded that the City Council's enactment of the Ordinances and rejection of the Site Plan was motivated solely by an irrational desire to thwart Corn's Project. (App. D-22, First Final Judgment).

Specifically, the trial court made the following findings:

1. Corn had a vested right to build the Project. (App. D-15, First Final Judgment).

2. Corn's vested right in the Project was a constitutionally protected property interest created by Florida law. (App. D-20, First Final Judgment).

3. The City acted arbitrarily and capriciously in denying approval of the Project, failing to independently evaluate the merits of the Project, and instead blindly following the will of the residents. (App. D-21, 22, First Final Judgment).

The district court awarded damages as just compensation to Corn. (App. D-32, First Final Judgment).

Corn appealed the First Final Judgment, claiming that the compensation awarded by the district court was not just. (App. C-5, *Corn III*). The City cross-appealed. (*Id.*) The Eleventh Circuit reversed the First Final Judgment, determining that certain findings of fact of the district court were clearly erroneous. (App. C-38, 39 *Corn III*). The Eleventh Circuit ruled that the proper standard

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[4] Through his substantive due process takings claim Corn maintained that the City's wrongful rejection of the Site Plan was arbitrary and capricious. (App. C-4-5, *Corn III*).

to be applied to Corn's substantive due process claim was whether a rational basis existed for the City's action, and reviewed the evidence and found that a rational basis existed for enacting the Ordinances and rejecting the Site Plan. (App. C-44, *Corn III*).

The Eleventh Circuit remanded the case to the district court for a consideration of Corn's just compensation claim,[5] which had not been ruled upon. (App. C-56, *Corn III*). The Eleventh Circuit also reversed the district court's dismissal of the City Councilmen, determining that the denial of the Site Plan was an administrative act, for which the City Councilmen only had qualified, rather than absolute immunity. (*Id.*).

On remand, the district court issued the Second Final Judgment, ruling in favor of the City and against Corn on Corn's just compensation claim (App. B, Second Final Judgment). Corn appealed the Second Final Judgment to the Eleventh Circuit, which affirmed the judgment in part and remanded the cause to the district court solely for a determination of whether Corn was deprived of all use of the Property during the moratorium.[6] (App. A, *Corn IV*). The Eleventh Circuit concluded as follows:

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[5] Through Corn's just compensation claim Corn maintained that the City's wrongful rejection of the Site Plan deprived him of economically viable use of his constitutionally protected property interest in the Project and the Property. (App. A-6-7, *Corn IV*).

[6] The district court has entered an order concluding that Corn was not deprived of all use of the Property during the moratorium, finding that the moratorium did not apply to the Property, since the moratorium applied to C-1 property and the Property was already rezoned to B-3. Corn has recently appealed this ruling to the Eleventh Circuit. The pendency of

1. While Corn was deprived of a use of the Property, he was not deprived of all uses of the Property from 1977 through 1985, while he successfully established in state court his vested rights and entitlement to build the Project. During the pendency of the state court litigation Corn could have and was obligated to develop the Property for some alternative use. (App. A-13, 14, *Corn IV*).

2. Even if Corn had vested rights in the Project, the City's denial of permission to build the Project does not state a claim for just compensation because Corn was not deprived of all uses of the Property. (App. A-19, *Corn IV*). A denial of the right to develop a particular project may give rise to a claim for just compensation for the taking of the project only if the government action in issue fails to advance a legitimate state interest. (App. A-21, *Corn IV*).

3. A party can have a constitutionally protected property right under the due process clause of the Fifth Amendment which does not qualify as property under the takings clause of the Fifth Amendment, so that just compensation is not due for the taking of the "property". (App. A-19, *Corn IV*).

Through this Petition Corn seeks review of certain legal issues determined in *Corn III* and *Corn IV*.

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this appeal does not have any impact whatever on the issues raised herein. Even if the Eleventh Circuit concludes that the moratorium applied to and deprived Corn of all use of the Property from June, 1977, through July, 1978, such a holding will not entitle Corn to compensation for the taking of the Project and the Property after July, 1978.

REASONS WHY THE WRIT SHOULD ISSUE

A. Corn's Vested Right to Build the Project Was a Constitutionally Protected Property Interest Which Was Confiscated For Which Just Compensation is Due.

1. This Court Has Identified, Without Resolving, the Issue of What Property Interest in Realty are Protected by the Takings Clause.

It is well settled that a landowner who is deprived of economically viable use of his property has suffered a taking for which compensation is due pursuant to the Fifth Amendment. *E.g. Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992). In *Lucas*, this court identified and did not answer an issue which is squarely raised by this Petition:

> If a landowner has a constitutionally protected property interest in an incident of land ownership less than fee simple title and is deprived of all economically viable use of that property interest, is the landowner entitled to just compensation pursuant to the Fifth Amendment, regardless of whether he is deprived of all use of his land?

In *Lucas*, this court explained:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since *the rule does not make clear the "property interest" against which the loss of value is to be measured.* * * * Unsurprisingly, this *uncertainty regarding the composition of the denominator in our "deprivation" fraction* has produced inconsistent pronouncements by the

> Court. * * * *The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property* – i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. (emphasis added). *Id.* at 1016, n.7.

In this case, the "denominator in the deprivation fraction" is Corn's constitutionally protected property interest in his vested right[7] to build the Project. Corn was deprived of *all* use of this property interest from June, 1977, through March, 1985, thereby effecting a compensable taking of his vested right to develop the Project, irrespective of whether there were other uses to which the Property could be put.[8]

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[7] Indeed, the specific question raised in this Petition of whether a state created vested right to develop land for a specific use or project is a constitutionally protected property interest for which compensation is due if the vested right is taken even if economically viable uses of the land remain was identified without being answered in *Williamson County*:

> We express no view of applying the "economic viability" test when the taking claim is based on such a theory of "vested rights" or "expectation interest". 473 U.S. at 191 n.12.

[8] Corn maintains that he was deprived of all economically viable use of the Property while he successfully pursued the state court litigation and established his right to build the Project because he was not obligated to develop the Property for any other use during the pendency of the litigation. *See* discussion §B, *infra*, at 22-24.

2. Florida Law Creates a Constitutionally Protected Property Interest in Vested Rights.

This Court has clearly explained that property interests protected by the Fifth Amendment's takings clause are not created by the Constitution, and instead, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. *E.g. Lucas,* 505 U.S. at 1016, n.7; *Ruckelshaus v. Monsanto Company,* 467 U.S. 986, 1001 (1984).[9]

It was conclusively established through the state court litigation that Corn had a vested right to build the Project so that the City was estopped from rezoning the Property and was compelled to approve the Site Plan and

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[9] In *Corn IV,* the Eleventh Circuit erroneously stated that "property" as used in the just compensation clause of the Fifth Amendment is defined much more narrowly than in the Fifth and Fourteenth Amendments due process clauses, so that while certain property interests may not be taken without due process, they may be taken without paying just compensation. (App. A-18, 19, Corn IV). The Eleventh Circuit is clearly wrong.

This Court has employed the identical standard of looking to existing rules or understandings that stem from an independent source such as state law to determine whether a party has a property interest for both takings cases, *e.g. Lucas,* 505 U.S. at 1030, and due process cases *E.g. Board of Regents v. Roth,* 408 U.S. 564, 577 (1972). Since resort is made to the same legal standard, an interest is either a property interest for both the takings clause and due process clause, or it is not a protected property interest for either clause. *See Texaco v. Short,* 454 U.S. 516, 525 (1982) (evaluation of whether Indiana state law created property interest in mineral rights for both claims of violation of due process and taking of property).

issue a building permit. (App. G, State Court Final Judgment; App. F-9, *State Corn I;* App. C-3, *Corn III*). Florida law creates a constitutionally protected property interest in Corn's vested right to develop the Project.

A vested right under Florida law is a property right which is created as a matter of fairness to protect the property owner from the loss of an interest in property which he has enjoyed. *Hollywood Beach Hotel v. City of Hollywood,* 329 So.2d 10, 15-16 (Fla. 1976). A city is equitably estopped from depriving a property owner of a particular property right as a result of conduct of the city upon which the landowner has relied to his detriment. *Id.; Sakolsky v. City of Coral Gables,* 151 So.2d 433, 436 (Fla. 1963). The city is estopped from exercising its police power to prohibit a particular use of land when the landowner's change of position in reliance on the city's actions would render it inequitable and unjust to destroy the right to use the land the landowner has acquired. *Hernando County Board of Commissioners v. S.A. Williams Corporation,* 630 So.2d 1155, 1156 (Fla. 5th DCA 1993). Under such circumstances the landowner's right to develop the property for a particular use becomes vested, and is not subject to revocation. *Hollywood Beach Hotel,* 329 So.2d at 16.

Vested rights are based upon the recognition that a landowner's reliance upon a city's conduct creates an expectancy or an entitlement to certain rights which it would be inequitable to allow a city to revoke. *Town of Largo v. Imperial Homes Corporation,* 309 So.2d 571, 573 (Fla. 2d DCA 1975). Vested rights thus protect a landowner against even otherwise *valid* zoning ordinances because, as a matter of fairness, a city cannot deprive a

landowner of a property interest created under such equitable circumstances. *Id.*

Florida courts have recognized that a property owner can have a vested right in a particular zoning classification, which prohibits a city from rezoning property. *Hollywood Beach Hotel*, 329 So.2d at 16; *Town of Largo*, 309 So.2d at 574. Florida courts have also recognized that a property owner can have a vested right in a building permit, or to the issuance thereof, thereby estopping the city from withdrawing or refusing to issue a permit. *Hollywood Beach Hotel*, 329 So.2d at 16; *The Florida Companies v. Orange County*, 411 So.2d 1008, 1011 (5th Cir. DCA 1982); *Town of Largo*, 309 So.2d at 573.

Having accorded vested rights such legal recognition and protection, Florida law has conferred the status of constitutionally protected property interests upon vested rights. *See Lucas*, 505 U.S. at 1016, n.7, 1030.

3. The Eleventh Circuit Recognizes that Vested Rights are Constitutionally Protected Property Interests Under Florida Law.

The Eleventh Circuit has confirmed that as a matter of constitutional law Florida law creates a constitutionally protected property interest in the vested right in a particular project or a building permit. *Reserve Ltd. v. Town of Long Boat Key*, 17 F.3d 1374, 1380 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 729 (1995) (Florida law creates constitutionally protected property interest in a building permit); *Spence v. Zimmerman*, 873 F.2d 256, 257-58 (11th Cir. 1989) (constitutionally protected property interest in a

permit or certificate of occupancy if the city lacks discretion and must issue the permit or certificate); *AA Profiles v. City of Fort Lauderdale*, 850 F.2d 1483, 1488 (11th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989), (property interest in woodchipping development); *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347, 1351 (11th Cir. 1990) (property interest in apartment project).

4. Recognizing Vested Rights as Constitutionally Protected Property Interests is Consistent with Supreme Court Takings Jurisprudence.

Recognizing that a vested property right is a constitutionally protected property interest for which compensation is due under the Fifth Amendment for its wrongful taking is consistent with takings jurisprudence.[10]

This Court has held that a property interest in real estate which is less than fee simple title ownership can be a constitutionally protected property interest for which compensation is due for its taking under the Fifth Amendment. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this court recognized that the right to

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[10] Scholars have recognized that vested rights have a constitutional base, conferring constitutional protection on property rights a landowner has acquired in the use of his land. D. Mandelker, *Land Use Law*, The Zoning Process §6.12, at 214 (1988). Vested rights have been recognized as a "super property right", being immune from exercise of the police power, and as such possessing more constitutional propriety weight than a mere property right. Hanes and Minchew, On Vested Rights To Land Use and Development, 46 *Washington Law Review* 373, 376 (1989). The exercise of regulatory police power that causes the diminishment of a vested right is one that goes "too far"." *Id.*

exclude others from one's property is a constitutionally protected property interest. *Id.* at 834; *see also Dolan v. City of Tigard*, 512 U.S. 374, 384. In *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922), this court held that the reservation of the right to mine underground coal was a constitutionally protected property interest. *Id.* at 413. Invasion of a landowner's airspace by planes whose noise diminished but did not destroy all viable use of the land was recognized as effecting a taking. *United States v. Causby*, 328 U.S. 256, 262 (1946). A tenant's leasehold interest in property, has been held to be a constitutionally protected property interest. *E.g. United States v. General Motors Corp.*, 323 U.S. 359, 378, 1945). Indeed, a real estate lien to secure a mortgage has been held to be a constitutionally protected property interest. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602 (1935). The taking of the right to devise a fractional interest in land has been held to effect a compensable taking. *Babbit v. Toupee*, 117 S.Ct. 727, 731-32 (1997).

In each of these cases the landowner had an expectation created by state law that the particular incident of ownership in land would not be interfered with or taken, thereby conferring constitutional protection upon each such property interest. Each interest in land in issue was an "essential stick in the bundle of rights that are commonly characterized as property", *see Nollan* at 831, because of the protection afforded the property interest by state law and the landowner's expectation of retaining the particular interest as a result thereof. Such state law legal recognition and protection creates a constitutionally

protected property interest in the incident of land ownership in issue for which just compensation is due pursuant to the Fifth Amendment if the property interest is taken.

In this regard, a factor "of particular significance" which is evaluated in determining whether a taking has occurred is the government's "interference with reasonable investment backed expectations". *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Vested rights are based upon the notion of the fairness of protecting and preserving a landowner's reasonable investment backed expectations created as a result of his detrimental reliance on governmental action. *See Hollywood Beach Hotel*, 329 So.2d at 15-16. Accordingly, by definition, one *always* has reasonable investment backed expectations in a vested property right. *See Town of Largo*, 309 So.2d at 573. Vested rights are thus appropriate property interests to be recognized as having been afforded constitutional protection pursuant to Florida law.[11]

5. *Corn IV* Failed to Protect Corn's Vested Rights.

The Eleventh Circuit erred as a matter of law in holding that the City's confiscation of Corn's vested right

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[11] This Court has protected vested rights from interference or confiscation by retroactive legislation. *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994). Indeed, in *Landgraf* this Court explained that the anti-retroactivity principle finds expression in several provisions of the Constitution, including the Fifth Amendment, which prevents government "from depriving private persons of *vested rights* except for a "public use" and upon payment of "just compensation"." (emphasis added). *Id.*

to build the Project did not give rise to a just compensation claim because Corn was not deprived of all use of his Property. The Eleventh Circuit erred by placing the Property in the denominator of the takings equation, rather than placing the Project in the denominator.

As a matter of law, Corn had a constitutionally protected property interest in the Project. The City's enactment of invalid Ordinances and wrongful denial of the Site Plan confiscated Corn's vested right to build the Project, entitling him to just compensation pursuant to the Fifth Amendment therefor, irrespective of whether Corn retained other economically viable uses of the Property.

B. The Confiscation of Corn's Constitutionally Protected Property Interest in the Project Effected a Taking of the Property Throughout the Pendency of the State Court Litigation.

Corn was indeed deprived of all economically viable use of the Property during the pendency of the state court litigation. Corn acknowledges that between July, 1978,[12] and March, 1985 there were alternative uses for which the Property "could" have been developed.[13] Nonetheless,

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[12] Between June, 1977 and July, 1978, Corn was prevented from developing the Property for any use pursuant to the moratorium ordinances. This is the sole issue currently on appeal to the Eleventh Circuit.

[13] By March, 1985, due to changes in demographics and overbuilding in the area, there was no economically feasible use to which the Property could be put, so that the temporary taking matured into a permanent taking.

Corn was not obligated to waive his constitutional rights and moot his state court litigation by developing the Property for any alternative use while successfully establishing his vested right to build the Project. As such, Corn was deprived of all use of his Property.

The Eleventh Circuit held that Corn was not deprived of all economically viable use of the Property during the pendency of the state court litigation, explaining:

> The standard is not whether the landowner has been denied those uses *to which he wants to put his land*; it is whether the landowner has been denied all or substantially all economically viable use of his land. (emphasis added). (App. A-13, *Corn IV*).

The error in the Eleventh Circuit's reasoning is that Corn's right to build the Project was not a use to which he simply *wanted* to put the Property; instead, Corn had a *vested right* to build the Project, with which right the City could not lawfully interfere. While Corn successfully participated in the state court litigation and established that he was wrongfully prevented by the City from building the Project he was not legally obligated to develop the Property for any alternative use.

As a practical matter, if Corn developed the Property for an alternate use, he would not have been able to build the Project. As a legal matter, development of an alternate use would have rendered moot the controversy regarding the City's duty to approve the Site Plan. *See Glisson v. Alachua County*, 558 So.2d 1030, 1037 (Fla. 1st DCA 1990) (issue of whether land use regulation effected taking of

property rendered moot when regulation amended); *Central and Southern Florida Flood Control District v. Duquis*, 162 So.2d 289, 291 (Fla. 3d DCA 1964) (conveyance of property to flood control district rendered moot issue of validity of reservation of rights to flood control district). Corn could not put the Property to any use during the pendency of the state court litigation without forfeiting his vested right to build the Project, and his constitutional right to be compensated for the City's confiscation of the Project. Corn would have forfeited his constitutional right to seek just compensation for the confiscation of the Project by mooting his state court claim because Corn's takings claim could never ripen without a resolution of the state court litigation. *Williamson County*, 473 U.S. at 194-95. The well settled doctrine of "unconstitutional conditions" prevents the City from forcing Corn to choose between developing the Property for an alternate use and Corn's right to develop the Project or to receive just compensation for the City's confiscation of the Project. *See Dolan*, 512 U.S. at 2317.

Since Corn could not be lawfully compelled to develop the Property for an alternate use during the pendency of the state court litigation, he was indeed deprived of *all* use of his Property during that time. Accordingly, Corn is entitled to just compensation for the taking of his Property.

The City always had the option of abandoning its confiscation of the Project at any time during the pendency of the state court litigation. *See First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S 304,

317 (1987).[14] Instead, the City elected to appeal rather than accept the State Court Final Judgment, and thereafter improperly condition approval of the Site Plan on platting the Property, thereby perpetuating the confiscation of the Project. Denying Corn just compensation because he could have developed the Property for an alternate use during the pendency of the state court litigation only serves to allow the City to accomplish that to which it did not have any legal or constitutional right – to prevent Corn from developing the Project without compensating him for confiscating his vested right to do so.

The Constitution and policy considerations dictate that Corn receive just compensation for his loss of all use of his Property during the pendency of the state court litigation.

C. Corn Established That the City's Actions Failed to Substantially Advance any Legitimate State Interest.

In *Corn III*, the Eleventh Circuit reviewed Corn's substantive due process claim.[15] The court held that a substantive due process claim requires the landowner to show that the City abused power and that the regulation

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[14] The pendency of the state court litigation for over seven years is clearly the type of abnormal delay in obtaining permits for which a taking claim arises. *See First English*, 482 U.S. at 321.

[15] This Court can consider questions raised in earlier appeals in a case in which there have been multiple appeals. *Mercer v. Theriot*, 377 U.S. 152, 153 (1964). Further, Corn raised these issues and they were considered in *Corn IV*. (App. A-9-10, *Corn IV*).

in issue does not bear a substantial relation to the public health, safety, morals, or general welfare. (App. C-10, *Corn III*). The court held that the burden is on the *developer* to prove that the governmental body acted arbitrarily and capriciously in refusing permission for the development, (App. C-10, *Corn III*), explaining that the inquiry is limited to whether the city's action had a rational relationship to a legitimate general welfare concern. (App. C-11, *Corn III*). The Eleventh Circuit reversed the First Final Judgment entered in favor of Corn, determining the district court had erred by applying the strict scrutiny standard of review instead of the deferential standard of the rational basis test. (App. C-38, *Corn III*).

1. The City's Enforcement of Invalid Ordinances and Wrongful Rejection of the Site Plan Was an Abuse of Power Which Could Not Advance Any Legitimate State Interest.

Preliminarily, in the typical takings case in which the issue is whether governmental regulation substantially advances a legitimate state interest, the regulation in issue is valid; accordingly, the analysis is whether the otherwise valid governmental regulation is invalid because the regulation fails to substantially advance a legitimate state interest. *E.g. Nollan*, 483 U.S. at 834. The inquiry focuses on the nexus between the governmental action and the professed legitimate state interest. *Dolan*, 512 U.S. at 386.

In this case it was conclusively established in state court that the Ordinances were invalidly enacted and that the City was estopped from denying approval of the Site

Plan. (App. G-15-17, State Court Final Judgment; App. F-5, 9, *State Corn I*). The City lacked discretion and was obligated to perform the ministerial act of approving the Site Plan which it had wrongfully rejected. (App. F-10, *State Corn I*). Accordingly, the "governmental regulation" in issue was invalid, irrespective of whether the requisite nexus between the City's actions and any legitimate state interest existed. Under these circumstances it is not necessary to examine the nexus between the City's conduct and its claimed legitimate state interest; invalid, prohibited regulation can never advance any legitimate state interest.

The City was estopped from exercising its police power and denying approval of the Site Plan. *See Hernando County*, 630 So.2d at 1156. It does not matter what motivated the City to wrongfully deny the Site Plan. It does not matter if the denial of the Site Plan would have served any legitimate state interest. The level of scrutiny between the City's wrongful actions and any putative legitimate state interest is irrelevant. Any attempted exercise of police power by the City was per se invalid and, accordingly, could not and did not advance any legitimate state interest.

Inexplicably, notwithstanding the State Court Final Judgment, the Eleventh Circuit engaged in a lengthy analysis of whether the City's invalid Ordinances and wrongful rejection of the Site Plan served the general welfare. (App. C-14-52, *Corn III*). Such analysis improperly disregards the conclusive effect which a state court judgment is to be afforded in federal court. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 485 (1982); *Allen v. McCurry*, 449 U.S. 90, 95-96 (comity between state and

federal courts the 'bulwark of the federal system'). The Ordinances could not be invalid under state law yet substantially advance any legitimate interest as a matter of constitutional law. The City's improper rejection of the Site Plan could not be prohibited under state law yet pass constitutional muster as advancing a legitimate interest. The full faith and credit which must be accorded the State Court Final Judgment mandates the conclusion that the city's wrongful rejection of the Site Plan failed to substantially advance any legitimate state interest.

The consequence of the City's abuse of power was the confiscation of Corn's right to build the Project and loss of all the use of the Property, thereby effecting a compensable taking.

2. The *Dolan* Rough Proportionality Standard Applies and Was Not Met by the City.

Alternatively, even if it is appropriate to analyze the nexus between the City's actions and any claimed legitimate state interests, the Eleventh Circuit identified and applied the incorrect standard of review. There must be a greater nexus than a rational basis between the denial of the Site Plan and the general welfare concerns identified in *Corn III*.

In *Dolan*, this Court identified the level of scrutiny to be applied to a city's actions to determine whether they are substantially related to a legitimate state interest. *Dolan*, 512 U.S. at 385. This Court identified the "essential nexus" which must exist between the professed legitimate state interest and the actions of the city. *Id.*

This Court held that when a city makes an adjudicative decision as distinct from a legislative one, the burden properly rests on the *city* to prove that its actions substantially advance a legitimate state interest. *Id.* at 391 n.8. There must be a "rough proportionality" between a city's actions and the stated public purpose. *Id.* at 391. Rough proportionality requires a reasonable relationship, a standard more strict than the rational basis level of scrutiny under the equal protection clause of the Fourteenth Amendment. *Id.* While no precise mathematical calculation is required, a city must make some effort to quantify its findings in support of its actions, and cannot simply believe that its actions will accomplish the desired result, to substantially advance a legitimate state interest. *Id.* at 395, 396.

The *Dolan* rough proportionality standard is applicable to this case. The City conditioned Corn's right to develop the Property on his forfeiture of his vested right to develop the Project, thereby seeking to exact a constitutionally protected property interest from Corn. Further this exaction was effected by an administrative act – the rejection of the Site Plan – and not a legislative act. (App. F-10, *State Corn I*). Accordingly, under *Dolan* it was the *City's* burden to establish that the rejection of the Site Plan bore a reasonable relationship or rough proportionality to the general health and welfare concerns the City allegedly sought to achieve.

Dolan establishes that the City indeed had an obligation to make a formal investigation of the Project before rejecting the Site Plan. Expression of citizen's concerns are not a sufficient basis upon which to take action. The City had to have actual evidence that the Project would

have a significant negative impact on traffic, parking, noise, aesthetics and any other matters of public interest before the City could lawfully reject the Site Plan in reliance thereon. *See Dolan*, 512 U.S at 395-96.

There is no dispute that the City lacked the requisite findings to sustain its rejection of the Site Plan in the name of the general welfare. Initially, the Planning and Zoning Board had recommended approval of the Site Plan twice after becoming satisfied that the Project complied with City regulations, including fire safety, traffic and landscaping. The City Council did not investigate mini-warehouses before acting. The City did not have the benefit of the report it directed the Planning and Zoning Board to prepare regarding the proximity of industrial uses to residences when it rezoned the Property and rejected the Site Plan. The City did not eliminate or prohibit other allowable uses of the Property which arguably cause more traffic, noise and air pollution. (App. D-21, First Final Judgment). While residents attended City Council meetings and expressed opposition to and concerns regarding the Project, the residents did not present the City with *any* evidence establishing *any* nexus between the Project and their concerns. There simply was no reasonable relationship between the represented public interest concerns and the Project to entitle the City to reject the Site Plan.[16]

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[16] If the *Dolan* rough proportionality standard does not apply this Court must identify the standard for analyzing the nexus between a city's actions and identified state interests in takings cases. The record evidence establishes that the invalid Ordinances and wrongful denial of the Site Plan failed to substantially advance any legitimate state interest, regardless of which standard applies.

CONCLUSION

The Eleventh Circuit has acknowledged that the issues presented through this Petition "reach beyond the fisc of one Florida community and the merits of one case, and involve questions about how decision making is allocated between a democratic institution such as an elected city council and the federal courts". (App. C-7, *Corn III*). The Eleventh Circuit has also acknowledged that the issues presented herein have not been addressed or decided by this Court. (App. A-16, n.5, *Corn IV*).

This case provides this Court with the opportunity to establish legal guidelines to be applied by the federal courts and state court in takings claims involving the taking of vested rights and takings effected through enforcement of invalid regulation. The issues presented are both significant and commonplace. All governmental entities and landowners shall benefit from this Court's resolution of the legal issues presented herein.

Corn respectfully requests this Court to grant Certiorari to consider the issues presented herein.

DATED: August 15, 1997

Respectfully submitted,

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APPENDIX M

In the United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

No. 97-3556

HERMAN CORN, Trustee,

Appellant,

vs.

CITY OF LAUDERDALE LAKES,
a Florida municipal corporation, et al.

Appellees.

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF APPELLANT

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March 10, 1998

HERMAN CORN, Trustee vs. CITY OF LAUDERDALE LAKES, a Florida municipal corporation, et al., CASE NO. 97-5336

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Counsel for Appellant, HERMAN CORN, Trustee, hereby certifies that the following is a complete list of the trial judges, all attorneys, and all persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of this particular case, including identifiable legal entities:

Lyman L. Allen

James C. Brady, P.A.

Carolyn Caster

Carolyn Caster, a Florida corporation

Milton Caster

Milton Caster, a Florida corporation

City of Lauderdale Lakes

Jerome J. Cohan

Corn Construction Corp., a Florida corporation

Herman Corn

Herman Corn, Trustee

Hilda Corn

Stephen H. Corn

Howard Craft

Honorable Gary M. Farmer

Rita and Irving Freidman Family Trust

Alfonso Gereffi

Louis Greenwald

Earl Johns

Earl Johns, Trustee of D.D.Y. Trust

Morris Klein

Andrew T. Lavin
Romanik, Lavin, Huss & Raoli
Navon, Kopelman, O'Donnell & Lavin, P.A.

Lesgreen Corp., a Florida corporation

Leslie Corn Corporation, a Florida corporation

Michael C. Mattson, Esq.
Cooney, Haliczer, Mattson, Lance,
Blackburn, Pettis & Richards, P.A.

Morgan, Lewis & Bockius

James C. Paine, District Judge (S.D. Fla.)

Estelle Silverman

Saul S. Silverman

Lillian Teperson

STATEMENT REGARDING ORAL ARGUMENT

Appellant Corn hereby requests oral argument.

Oral argument shall afford the parties with the opportunity to address any questions this court may have regarding the substantial record or the legal issues presented in this appeal.

STATEMENT OF TYPE SIZE AND STYLE

This brief has been prepared in the type size and style of: 14 point Times Roman.

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STATEMENT OF JURISDICTION

The district court's Final Judgment and Findings of Fact and Conclusions of Law Upon Remand and the Order Denying Plaintiff's Motion to Set Aside Findings of Fact and Conclusions of Law and For New Trial are appealable as final decisions pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Are the district court's findings of fact that the City's one year moratorium on issuance of building permits did not apply to Corn's property, so that Corn was not deprived of all economically viable use of the property during the moratorium clearly erroneous when:

a) the record evidence is uncontroverted that the City intended for the moratorium to apply to Corn's property, and acted as if the moratorium applied to the property,

b) the City has made numerous judicial admissions over the past 20 years that the moratorium applied to the Property and deprived Corn of all use of his property, and

c) courts have found that the moratorium applied to the property and deprived Corn of all use of the Property?

2. Did the district court deprive Corn of his constitutional right to procedural due process on remand by failing to afford Corn an opportunity to be heard and present evidence on factual issues which were first raised by this Court on appeal because these matters had not been previously contested by the City?

STATEMENT OF THE CASE

I. Nature of the Case

On July 12, 1977, the City of Lauderdale Lakes ("City"), rejected a site plan, (the "Site Plan"), submitted by Appellant Corn ("Corn"), for the development of a mini-warehouse facility with an attendant strip shopping center (the "Project"), on an 8½ acre parcel of property

(the "Property"), situated in the City. To ensure that Corn could not develop the Project on the Property the City rezoned the Property from C-1A to a B-3 zoning category, eliminated warehouses as an authorized use in the C-1 zoning district and enacted a moratorium on the issuance of building permits for Corn's Property for one year.

Corn successfully sued the City in state court and had all of the ordinances declared to have been wrongfully enacted and inapplicable to the Property. The state court directed the City to approve the Site Plan and issue a building permit for the Project upon Corn's correction of three minor items on the Site Plan. The City appealed and the state court litigation was not finalized until 1985, during which time Corn was prevented from building the Project.

Through this federal litigation instituted in 1984, Corn has sought just compensation for the City's unconstitutional taking of his Property. To date, Corn's efforts to secure compensation have been unsuccessful. Most of Corn's claims have been considered and rejected by this Court.

This appeal involves a review of the district court's determination that the approximate one year moratorium did not apply to the Property, and accordingly did not deprive Corn of all economically viable use of the Property. These findings are clearly erroneous. There is no record evidence whatsoever to support the findings. To the contrary, the record unequivocally establishes that the city interpreted the ordinances imposing the moratorium as applying to the Property and for the past twenty years

has expressly acknowledged that the moratorium applied to the Property.

Corn seeks the opportunity to recover just compensation for, at the least, the confiscation of his Property for the one year during which the moratorium was in effect and prevented him from using the Property.

II. The Course of Proceedings

This appeal is a continuation of litigation between these parties which commenced in state court in 1977, and has continued since then, uninterrupted.

During 1977, Corn instituted litigation in state court (the "State Court Litigation"), against the City and its individual City Council members (the "Appellee Councilmen"). (PX-43, Amended Petition for Mandamus). Through the State Court Litigation Corn challenged the validity of three ordinances which had been enacted by the City, (collectively referred to as the "Ordinances"), and the City's denial of Corn's Site Plan. The Ordinances rezoned the Property, deleted warehouses as a permitted use in the zoning category originally applicable to the Property, and established a moratorium on the issuance of building permits for the Property for approximately one year (the one year ban referred to as the "Moratorium"). Corn sought a Writ of Mandamus, contending that the Ordinances were invalid as applied to the Property and that the City had a ministerial duty to approve the Site Plan and issue a building permit for the Project.

On October 20, 1978, the state court issued its Final Judgment, (the "State Court Final Judgment"), declaring

the Ordinances invalid, and directing the City to approve the Site Plan upon Corn's correction of three minor deficiencies, and to issue a building permit for the Project (PX-48, State Court Final Judgment).

The City appealed the State Court Final Judgment. On February 16, 1983, the appellate court affirmed the State Court Final Judgment. *City of Lauderdale Lakes v. Corn*, 427 So.2d 239 (Fla. 4th DCA 1983) (*"State Corn"*). (R1-1 Exhibit P).

On January 17, 1984, Corn filed a Complaint in the Southern District of Florida against Appellees seeking damages pursuant to 42 U.S.C. § 1983, for Appellees' taking of Corn's Property without just compensation in violation of the Fifth Amendment and Fourteenth Amendment. (R1-1, Complaint). Corn alleged that Appellees' enactment and enforcement of the Ordinances and wrongful denial of the Site Plan in 1977 effected a temporary taking of the Project and the Property. Included in the Complaint were counts seeking compensation for inverse condemnation, or the taking of the Property without just compensation, and the recovery of damages for violation of Corn's rights of substantive due process. *Id.*

On October 26, 1984, Corn filed a Motion to Enforce Final Judgment in the State Court Litigation. (PX-64A). Corn sought to have the state court enforce the State Court Final Judgment and require the City to unconditionally approve a revised Site Plan he had submitted and issue Corn a building permit. *Id.* On March 26, 1985, the state court entered an Order, finding in favor of Corn,

and directing the City to forthwith issue a building permit upon Corn's submission of appropriate plans and specifications. (PX-64b).

In the federal litigation, the district court dismissed Corn's Complaint, relying upon *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S 172 (1985). (R2-49, Order). Corn appealed the dismissal of the Complaint to this Court. (R2-51, Notice of Appeal). This Court reversed the dismissal of the Complaint, and remanded the case to proceed to trial. *Corn v. City of Lauderdale Lakes*, 816 F.2d 1514 (11th Cir. 1987) ("*Corn I*").

Appellees again moved to dismiss the Complaint and for summary judgment (R2-65, 67). The district court denied the Motion to Dismiss and for Summary Judgment of Appellee City, (R3-85), and ultimately granted the Motion to Dismiss filed on behalf of the Appellee Councilmen, determining that the Appellee Councilmen enjoyed absolute legislative immunity from suit (R4-101, Order).

In September, 1988, the district court acknowledged uncertainty as to whether the City was entitled to Summary Judgment, and for that reason, certified an interlocutory appeal to this Court of the denial of the City's Motion for Summary Judgment. (R4-107, Order). In November, 1988, this Court granted the City's petition for permission to appeal, the district court's Order denying its Motion for Summary Judgment pursuant to 28 U.S.C. § 1292(b). (R5-159, Order).

In *Corn v. City of Lauderdale Lakes*, 904 F.2d 585 (11th Cir. 1990), ("*Corn II*"), this Court affirmed the district

court's denial of the City's Motion for Summary Judgment, holding that Corn's action was not barred by the doctrine of res judicata or the statute of limitations. (*Id.* at 587-88).

Thereafter, the cause was remanded to the district court and the case was set for trial. (R5-104, Mandate). This cause proceeded to a four day non-jury trial held August 12-15, 1991, before the Honorable James C. Paine, District Judge. On August 30, 1991, the district court entered its Findings of Fact and Conclusions of Law, ("First Findings of Fact"), (R7-208), and its Final Judgment, ("First Final Judgment"), (R7-209), ruling in favor of Corn on his substantive due process claim. The district court found that the City had acted arbitrarily and capriciously in denying approval of the Site Plan, and awarded damages in the total sum of $727,875.02. (*Id.*).

Corn appealed the First Final Judgment, claiming the compensation awarded by the district court was not just. (R7-224). The City thereafter cross-appealed. (R7-226). This Court reversed the First Final Judgment, determining that certain findings of fact of the district court were clearly erroneous and that Corn had failed to establish his substantive due process claim that the City acted arbitrarily and capriciously. *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1391 (11th Cir. 1993), *cert. denied*, 511 U.S 1018, (1994), ("*Corn III*").

This Court remanded the case to the district court for a consideration of Corn's just compensation claim, which had not been ruled upon by the district court. *Id.* at 1393. This Court also reversed the district court's dismissal of the Appellee Councilmen, determining that they did not

have absolute immunity from suit, and instead only had qualified immunity in connection with their denial of the Site Plan. *Id.* at 1393.

On March 29, 1994, the district court issued its Order Upon Appellate Mandate, directing the parties to file Status Reports addressing matters including the legal standards to be applied to Corn's just compensation claim, the applicability of qualified immunity to the Appellee Councilmen, and the need for additional court proceedings on these claims. (R7-264). Corn and the City thereafter filed their respective Status Reports. (R7-267, R7-268). Corn acknowledged in his Status Report that a new trial to resolve his just compensation claim was not needed *unless* the court thought it would be necessary to receive additional evidence on whether Corn was denied substantially all economically viable use of the Property. (R7-267, Corn's Status Report at 3, n.1.).

On June 13, 1994, the district court issued its Findings of Fact and Conclusions of Law upon Remand (the "Second Findings of Fact"), and its Final Judgment (the "Second Final Judgment"). (R7-273, 274). Through the Second Findings of Fact and Second Final Judgment the court found in favor of Appellees and against Corn on Corn's just compensation claim and entered judgment in favor of Appellees and against Corn.

Corn appealed the Second Final Judgment. (R7-280). This Court affirmed the Second Final Judgment in part, and vacated that portion of the Second Final Judgment regarding Corn's claim that the Moratorium effected a temporary taking of the Property because the district court's findings were not sufficient for effective appellate

review. *Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1076 (11th Cir. 1996, *cert. denied*, 511 U.S. 1018, (1997) ("*Corn IV*"). This Court remanded this cause to the district court to make findings as to the economically viable uses of the Property during the Moratorium. *Id.* at 1073.

On April 25, 1997, four days after this Court denied Corn's Petition for Rehearing of *Corn IV*, the district court entered its Findings of Fact and Conclusions of Law Upon Remand (the "Third Findings of Fact") and "Third Final Judgment"). (R7-1284). The district court found that since the Moratorium applied to C-1 zoned property and the Property was rezoned on July 12, 1977, from C-1A to B-3, the Moratorium did not apply to the Property, and Corn could have developed the Property for B-3 use any time after July 13, 1977. (R7-284-11). The district court thus concluded that Corn was not deprived of all economically viable uses of the Property during the Moratorium and entered judgment in favor of the City. (R7-284-12).

Corn moved to set aside the Third Findings of Fact claiming that he was deprived of due process of law because the trial court did not allow Corn any opportunity to be heard or present evidence on the issue of whether Corn was deprived of all economically viable uses of the Property during the Moratorium. (R7-286). Corn's motion was denied. (R7-287).

Corn perfected this appeal by filing his Notice of Appeal on July 30, 1997. (R7-288).

III. Statement of the Facts

The Property was part of a 261 acre tract, (the "Parcel"), acquired by Corn in 1966, when the Parcel was located in unincorporated Broward County, and zoned for agricultural use. (State Court Final Judgment at 1-2; R9-42-43 Herman Corn; First Findings of Fact at 1559). The City approached Corn regarding annexation of the Parcel. (R9-42, Herman Corn). The Parcel was annexed into the City and ordinances were enacted zoning the acreage within the Parcel for residential, commercial and industrial use, in accordance with Corn's proposed development plan (R9-43-47, Herman Corn; First Findings of Fact at 1560).

Ordinances 105, enacted by the City during 1966 zoned the Property C-1A, (PX26-11, Ordinance 105), light industrial use. (R11-530, Schiff). The land immediately north and west of the Property was zoned for residential use (R9-48, Herman Corn; Findings of Fact at 1560). The Property was bounded on the south by an existing canal and on the east by U.S. 441. (*Id.*; PX-57A-C aerial photographs). Corn expended in excess of $100,000.00 in reliance upon the City's actions of annexing and zoning the Property C-1A, developing the Property for its ultimate use as C-1A property. (State Court Final Judgment at 2; R9-85, Stephen Corn; First Findings of Fact at 1560). Corn constructed canals on the western and northern borders of the Property to create a buffer between the Property and the proposed residential areas. (State Court Final Judgment at 2; R9-48, Herman Corn; First Findings of Fact at 1560). These canals fixed the dimensions of the Property at 370' wide fronting on U.S 441, and 1,030' deep. (R9-84, Stephen Corn).

Corn thereafter developed the Parcel in accordance with the original plan, first building single family homes and then condominiums. (State Court Final Judgment at 2, 12; R9-81-82, Stephen Corn).

On April 1, 1977, Corn submitted the Site Plan to the City. (PX-20, Site Plan; R9-97, Stephen Corn; Findings of Fact at 1560). The Site Plan depicted the construction of the Project, including an approximate 103,000 square foot mini-warehouse covering the majority of the Property and an approximate 67,000 square foot shopping center across the eastern portion of the Property, fronting on U.S. 441, situated in front of the mini-warehouse facility. (*Id.*)

The Site Plan was approved by the City's Planning and Zoning Board on two separate occasions. (State Court Final Judgment at 7; PX-26-43, 26-44, Planning and Zoning Board Memoranda; Findings of Fact at 1560). The City Council tabled consideration of the Site Plan at meetings held on May 31, June 14 and June 21, 1977. (State Court Final Judgment at 7-8; R9-106, Stephen Corn; Findings of Fact at 1560). At these meetings residents living adjacent to the Property actively opposed the Project. These individuals resided in the residential portions of the Parcel which the City knew in 1966 would be adjacent to the Property for which Corn had expended money to create the canal buffer. (State Court Final Judgment at 12). While residents raised concerns regarding the Project, *Corn III* at 1387, each of these issues had been considered by the City's Planning and Zoning Board, and it was determined that the Site Plan complied with all of the City's regulations and ordinances regarding these matters. Further, prior to July 12, 1977, the City Council did not make any

attempt to investigate mini-warehouse uses or to determine whether any of the residents' concerns regarding the Project were valid. (R11-500-02 Craft; First Findings of Fact at 1560).

Ultimately, on July 12, 1977, before considering approval of the Site Plan the City Council passed on first reading Ordinance 549, (PX-78), which rezoned the Property from C-1A to B-3, a more restrictive category, and Ordinance 548, (PX-77), which eliminated storage warehouses as a permitted use in zoning categories C-1 and C-1a. (State Court Final Judgment at 9; First Findings of Fact at 1560). The City did not eliminate any other uses from the C-1A zoning category, including uses which caused more traffic, noise or other alleged concerns of the City. (R11-515, Craft; First Findings of Fact at 1560). This was the first time that the City Council considered rezoning the Property or changing the permissible uses within the C-1A category. (State Court Final Judgment at 9; R11-508-09, Craft; First Findings of Fact at 1560).

After passing these ordinances on first reading and based thereon, the City Council denied approval of the Site Plan. (PX-22, City Council Minutes; First Findings of Fact at 1560).

The City soon thereafter enacted Ordinance 552, (PX-79), which imposed a 150-day building moratorium, prohibiting the issuance of building permits for the two parcels of C-1 property in the City, one of which was the Property. (State Court Final Judgment at 9; First Findings of Fact at 1560). The stated purpose of the moratorium was to determine whether the two C-1 parcels which were adjacent to residentially zoned property should be

rezoned. (PX-79). The Planning and Zoning Board was directed to submit a report within 60 days. *Id.* This report was not submitted until December 23, 1977. (*Corn III* at 1384).

On September 20, 1977, Ordinance 549, which rezoned the Property from C-1A to B-3, was passed on second reading, at which time Ordinance 549 first became effective. (PX-78; R2-86-8, City Answer).

On January 10, 1978, Ordinance 568 was enacted on an emergency basis, extending the moratorium through July 4, 1978. (PX-60; Findings of Fact at 1561). (Ordinances 552 and 568 shall hereafter be collectively referred to as the "Moratorium Ordinances"). Accordingly, the Moratorium was in effect for almost one year.

Corn then filed the State Court Litigation, challenging the validity of the Ordinances and seeking to compel the City to approve the Site Plan. (PX-43, Amended Petition for Mandate; First Findings of Fact at 1561). The State Court Final Judgment determined that Corn had vested rights to the C-1A zoning of the Property, based upon his following of the previously approved plan of development for the Parcel, the substantial physical change made to the characteristics of the Property, including the construction of the canals, and the expenditure of in excess of $100,000.00 developing the Property. (State Court Final Judgment at 11-14). It was concluded that the Ordinances were invalid for the City's failure to follow its own notice and procedural requirements. (*Id.* at 10). The state court further determined that it would be inequitable to allow

the City to apply the Ordinances to Corn and the Property given Corn's changes in position in reliance upon the C-1A zoning of the Property. (*Id.*)

The state court thus determined that the Ordinances were void and unenforceable as against Corn and the Property. (*Id.* at 14). The state court further determined that the City was obligated to approve the Site Plan upon Corn's correction of three minor deficiencies which the City had never afforded Corn the opportunity to correct. (*Id.* at 13). The State Court Final Judgment directed the City to approve the Site Plan and to issue a building permit for the Project. (*Id.* at 14-15).

The City appealed the State Court Final Judgment. *State Corn.* Pursuant to Fla.R.App.P.9.310, the appeal effected an automatic stay of the State Court Final Judgment, so that the Ordinances remained in force and effect, and the City was not obligated to approve the Site Plan during the pendency of the appeal. (*Corn II* at 586; R10-293, Farmer).

On February 16, 1983, the state appellate court affirmed the State Court Final Judgment. *State Corn.* The appellate court issued its mandate on March 4, 1983, at which time the appellate court's opinion became final. (First Findings of Fact at 1561.) As a result, the stay of the State Court Final Judgment was finally lifted so that the Ordinances became void and invalid as to the Property and the City was obligated to approve the Site Plan and issue a building permit for the Project.

After the appellate court issued its mandate, Corn communicated with the City regarding the steps necessary to finalize the Site Plan. (R9-128, Stephen Corn;

R12-595-96, Brady). During October, 1983, Corn submitted a revised Site Plan to the City for approval. (PX-56). The City refused to approve the revised Site Plan unless Corn platted the Property. (R9-128, Stephen Corn; R12-614, Brady). Platting would not have been required had the Site Plan been approved during July, 1977. (R9-129, Stephen Corn). Platting the Property would have required a reduction in the size of the Project, a dedication of land, payment of impact fees, and delay in the commencement of the Project. (R9-130, Stephen Corn).

On October 26, 1984, Corn filed a Motion to Enforce Final Judgment in the State Court Litigation. (PX-64A). Corn sought to have the state court enforce the State Court Final Judgment and require the City to unconditionally approve the Site Plan and issue Corn a building permit without having to plat the Property. (*Id.*).

On March 26, 1985, the state court entered an Order, finding in favor of Corn, concluding that Corn was not required to plat the Property, and directing the City to forthwith issue a building permit upon Corn's submission of appropriate plans and specifications. (PX-64B).

Corn did not thereafter resubmit the Site Plan, or any revision thereof to the City, having concluded that the changes in the area and growth of competition in the intervening eight years had rendered commencing the Project at that time economically unfeasible. (R9-182-84, Stephen Corn; PX-31, Feasibility Report). Corn has unsuccessfully attempted to sell the Property since 1985. (R9-187, Stephen Corn).

As of this date, the Property is still owned by Corn and remains vacant. (*Id.*).

STANDARD AND SCOPE OF REVIEW

Through this appeal Corn seeks review of certain legal issues and mixed questions of legal and factual issues which implicate constitutional rights. Such issues are subject to de novo review by the appellate court, without any deference afforded the trial court's determination of the issue. *E.g. In re: Georg*, 930 F.2d 1563, 1565 (11th Cir. 1990); *Tally-Ho, Inc. v. Coast Community College District*, 889 F.2d 1018, 1022 (11th Cir. 1990); *Greenbriar v. City of Alibaster*, 881 F.2d 1570, 1578 (11th Cir. 1989).

Further, certain of the findings of fact of the district court were clearly erroneous. A finding is clearly erroneous when it is not supported by the record or when, although there is evidence to support it, on the entire evidence, the reviewing court is left with the definite and firm conviction that a mistake has been committed. *Trust Company Bank v. MGM/UA Entertainment Company*, 772 F.2d 740, 746 (11th Cir. 1985). If a finding is directly contrary to the only testimony presented, it is properly considered to be clearly erroneous. *Trans-Orient Marine Corporation v. Star Trading and Marine, Inc.*, 925 F.2d 566, 571 (2d Cir. 1991). A trial court's finding is also clearly erroneous if it is contrary to the "right and justice of the case". *Weisel v. Singapore Joint Venture, Inc.*, 602 F.2d 1185, 1190 (5th Cir. 1979).

SUMMARY OF THE ARGUMENT

This appeal is the fifth appeal to this Court emanating from the City's refusal on July 12, 1977, to allow Corn to construct a mini-warehouse/shopping center project (the "Project"), on an 8½ acre parcel (the "Property").

Corn has been engaged in continuous litigation with the City since 1977 regarding, first, his right to build the Project, and then, his right to just compensation for the City's taking of his Property and his Project.

Corn prevailed at the first level. The state court concluded that the City had failed to follow its own procedures and wrongfully interfered with Corn's vested rights when the City wrongfully enacted ordinances rezoning Corn's Property from C1-A to B-3, eliminated warehouses as an authorized use in the C-1 zoning category, and imposed a one year moratorium on building permits and improperly rejected the site plan for the Project (the "Site Plan"). The state court declared the ordinances invalid as enacted and as applied and directed the City to approve the Site Plan and issue a building permit for the Project.

The City still wasn't willing to allow Corn to build the Project and appealed the State Court Final Judgment, which stayed the City's duty to approve the Site Plan. On March 4, 1983, the State Court Final Judgment was affirmed.

The City, still unwilling to allow Corn to build the Project, refused to approve a revised Site Plan, forcing Corn to return to court and on March 26, 1985, secure an Order compelling the City to approve the Site Plan.

To date, Corn has failed in federal court in his efforts to compel the City to compensate him for the taking of his Property and his Project through its wrongful refusal to approve his Site Plan between July, 1977 and March, 1985. Unfortunately, whether developers like Corn are

not viewed sympathetically or for other inexplicable reasons, to date, Corn has not recovered any compensation for his having established in state court that the City wrongfully confiscated his Property and his Project by improperly enforcing invalid ordinances and rejecting his Site Plan.

At this point, Corn's remaining claim is that the Property was unconstitutionally taken for approximately one year, between July 12, 1977 and July 4, 1978, while the city's ordinances establishing a moratorium were in effect. When this cause was last before this Court this matter was remanded to the district court for findings regarding whether there were economically viable uses of the Property while the moratorium was in effect. If there were no economically viable uses, the Property was temporarily taken and Corn is entitled to just compensation.

Significantly, in remanding for these findings this Court acknowledged that the City and Corn have proceeded in this litigation on the assumption that the moratorium applied to the Property, so that there were no economically viable uses of the Property during the moratorium. Indeed, the record evidence is uncontroverted that the City enacted the moratorium to prevent Corn from developing the Property, and that while the moratorium was in effect the City acted as if the moratorium applied to the Property. Further, for the past 20 years the City has expressly acknowledged in pleadings filed in this litigation that the moratorium applied to the Property and prevented all use of the Property. As recently as last year, in a Reply Brief filed in the United States

Supreme Court, the City clearly stated that the moratorium prevented construction on the Property through July 4, 1978, the expiration of the moratorium.

There is absolutely no evidence in the record whatever that the Moratorium did not apply to the Property. There is overwhelming evidence and judicial admissions by the City that the Moratorium prevented all use of the Property through July 4, 1978. All courts presiding over this case, including the district court, have expressly found that the Moratorium applied to the Property and denied Corn of all use of the Property.

The district court's factual findings to the contrary are clearly erroneous and erroneous as a matter of law.

Alternatively, if the record does not clearly establish that the district court's findings are clearly erroneous, the district court deprived Corn of his constitutional right of procedural due process by failing to afford Corn any opportunity to be heard and present evidence on remand regarding the applicability of the Moratorium to the Property. Corn never had an opportunity to litigate this issue at the original trial because, as this Court acknowledged, the City conceded that the Moratorium applied to the Property and denied Corn all use of the Property. In such event, this cause must be remanded with directions to the district court to hold an evidentiary hearing on the applicability of the Moratorium to the Property and whether Corn was denied all use of the Property during the Moratorium.

In either case, this cause must be remanded for the awarding of just compensation for the temporary taking of the Property.

This appeal provides Corn with one of his last opportunities to secure the just compensation which the United States Constitution, equity and fairness all dictate. This appeal affords this Court with, conceivably, its last opportunity to right this unconstitutional wrong.

ARGUMENT

I. The District Court's Finding That Corn Was Not Deprived of All Economically Viable Use of the Property During the Moratorium Was Clearly Erroneous.

a. Legal Standard for Constitutional Takings Claims.

The Fifth Amendment of the United States Constitution provides in pertinent part:

> [N]or shall property be taken for public use, without just compensation.

The Fifth Amendment is applicable to municipalities pursuant to the Fourteenth Amendment of the United States Constitution, which provides:

> No state shall make or enforce any law which shall abridge the privileges of immunity through the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It is clearly recognized that a municipality can effect a taking of a landowner's property through regulation, even though the regulation does not create a physical invasion or actual physical deprivation of property. *Lucas*

v. South Carolina Coastal Council, 505 U.S. 1003, 1115 (1992). A regulation which deprives a landowner of substantially all economically viable use of his property effects a compensable taking of the property. *Id.* This Court has designated such a takings claim as a "just compensation claim". *Eide v. Sarasota County*, 908 F.2d 716, 720-21 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991). Further, the Supreme Court has held that a landowner is entitled to just compensation for the temporary regulatory taking of property for the period of time during which the regulation was in effect. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 321 (1987). This Court has ordered just compensation for a temporary taking which lasted fourteen months. *Wheeler v. City of Pleasant Grove*, 896 F.2d 1347, 1351 (11th Cir. 1990).

Accordingly, if the Moratorium applied to the Property, thereby depriving Corn of all economically viable use of the Property for approximately one year, then Corn has established his just compensation claim and is entitled to recover compensation for the temporary taking of the Property.

b. This Court Remanded a Specific Factual Issue to the District Court.

In *Corn IV*, this Court vacated and remanded the Third Final Judgment in part, determining that the district court's factual findings regarding whether Corn was deprived of substantially all economically viable use of the Property during the Moratorium were insufficient for

effective appellate review. *Corn IV* at 1076. Specifically, this Court explained:

> The district court's factual findings were insufficient for effective appellate review. *We are unable to determine from the record whether the district court's conclusion that the [Property] could be put to economically viable use during the [M]oratorium is clearly erroneous. The parties proceed on the assumption that the [M]oratorium prohibited Corn from building anything on the [Property].* However, our review of the ordinances reveals that the [Property] was rezoned B-3 within a month after the [M]oratorium began, suggesting that the [Property] thereafter may not have been subject to the [M]oratorium. It may be that the district court based its conclusion on a finding that, during the [M]oratorium, Corn could use the [Property] for any use permitted by the B-3 zoning classification, but any such finding was not explicit. Hence, we remand for the court to make findings as to the economically viable uses of the [Property] during the [M]oratorium. (emphasis added). *Id.*

This Court thus recognized that if Corn was deprived of substantially all economically viable use of the Property for the approximate one year that the Moratorium was in effect, he would have established a just compensation claim of a temporary taking of his property during the Moratorium. The only matter remanded was the factual issue of whether Corn was denied all economically viable use of the Property during the Moratorium. *Corn IV* at 1076.

On remand, without affording Corn any opportunity to be heard, or to present evidence on this issue, the

district court found that Corn was not deprived of substantially all economically viable use of the Property during the Moratorium. (R7-284-11). The district court found that the Moratorium applied to C-1 zoned property and the Property was rezoned to a B-3 classification on July 12, 1977, so that the Moratorium did not apply to the Property and Corn could have developed the Property for any use allowable in the B-3 zoning classification after July 13, 1977. (*Id.*) This finding of fact was clearly erroneous.

c. The Record Undeniably Establishes that the Moratorium Applied to the Property, Thereby Depriving Corn of All Economically Viable Use of the Property During the Moratorium.

The issue of the applicability of the Moratorium was raised by this Court in *Corn IV* based upon the express wording of the Moratorium Ordinances, which on their faces apply to C-1 zoned property, and the fact that the Property was rezoned from C-1 to B-3 while the Moratorium was in effect. Notwithstanding the literal language of the Moratorium Ordinances and the rezoning of the Property, the *City* has always maintained and has never disputed that the Moratorium applied to the Property. The City has made numerous judicial admissions that the Moratorium deprived Corn of all use of the Property until July 4, 1978. Courts have made this finding.

Irrespective of the express language of the Moratorium Ordinances the record unequivocally establishes that the City applied the Moratorium Ordinances to the

Property and denied Corn all use of the Property for approximately one year.

(i). The Property Was Not Rezoned Until September 20, 1977.

Preliminarily, while Ordinance 549, which rezoned the Property from C-1A to B-3, was passed on first reading on July 12, 1977, it was not passed on second reading and accordingly did not become effective until September 20, 1977 (PX-78; R2-86-8, City Answer). The Property remained zoned C-1A through September 20, 1977, and the Moratorium clearly applied to the Property through this date. Corn could not develop the Property for any use between July 12, 1977 and September 20, 1977.

Accordingly, the district court's finding that Corn could have developed the Property at any time after July 13, 1977 for a use authorized under the B-3 zoning classification is clearly erroneous.

(ii). The City Intended For and Interpreted the Moratorium Ordinances to Apply to the Property.

While the Moratorium was in effect the City interpreted the Moratorium Ordinances as applying to the Property. The City intended for the Moratorium Ordinances to prohibit development of the Property through July 4, 1978, and interpreted and applied the Property Ordinances to accomplish this objective.

Ordinance 552, which first established the Moratorium, refers to two parcels of C-1 zoned property in

the City. (PX-79). One of these properties was the Property. (R11-509, Craft; R12-592, Brady). The purpose of Ordinance 552 was to establish a moratorium applicable to the Property to enable the Planning and Zoning Board to determine whether the Property should be rezoned. (R11-512, Craft). The City Attorney advised the City Council that the City could maintain the status quo regarding the Property by enacting a moratorium. (R12-595, Brady). Indeed, the City Attorney testified that the owner of the other C-1 property in the City "got caught in the broad sweep of Ordinance 552". (R12-612, Brady). The only record evidence is that the Moratorium was intended to apply to the Property.

Pursuant to Ordinance 552, the Planning and Zoning Board was directed to prepare a report for the two C-1 properties, regarding whether residentially zoned property contiguous to the C-1 zoned property suffers adverse effects. (PX-79). On December 23, 1977, the Planning and Zoning Board submitted this report to the City. (*Corn III* at 1384). Despite the fact that the Property was rezoned B-3 on September 20, 1977, this report discusses the Property and its impact on the adjacent residential area and proposes the rezoning of the Property to B-3. (*Id.*).

On January 10, 1978, the City enacted Ordinance 568 on an emergency basis, passing it on both first and second reading on this date, extending the original moratorium which had expired on January 6, 1978, through July 4, 1978. (PX-60). Ordinance 568 refers to the "properties currently zoned C-1 and/or C-1A." (*Id.*). The only property ever zoned C-1A in the City was the Property. (R1-47, Herman Corn; R12-594, Brady). Accordingly, Ordinance 568 purported to extend the Moratorium on

the Property, regardless of whether the Moratorium Ordinances strictly applied to the Property.

Indeed, in remanding this matter in *Corn IV* this court correctly discerned that the City has always maintained that the Moratorium applied to the Property, stating:

> The *parties* proceed on the assumption that the [M]oratorium prohibited Corn from building anything on the [Property]. (emphasis added). *Corn IV* at 1076.

The City has proceeded on this assumption because the City has always intended for, and interpreted the Moratorium Ordinances to apply to the Property. There is no evidence in this record whatsoever to the contrary.

The City's contemporaneous interpretation and application of the Moratorium Ordinances was binding on the district court. *See Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1545, *vacated for rehearing*, 42 F.3d 626 (11th Cir. 1994); *P.W. Ventures v. Nichols*, 533 So.2d 281, 283 (Fla. 1988) (contemporaneous construction of statute by agency accepted by court unless it is clearly unauthorized or erroneous). The district court's interpretation of the Moratorium Ordinances as not applying to the Property was clearly erroneous.

(iii). The City Has Made Binding Judicial Admissions That the Moratorium Applied to the Property.

Indeed, the City has steadfastly and repeatedly over the past 20 years acknowledged in its pleadings and at

trial that the Moratorium applied to the Property. Such judicial admissions are binding and remove from dispute that the Moratorium applied to the Property.

The City has *admitted* in positions taken and pleadings filed in this action in district court, this Court and the Supreme Court that the Moratorium applied to the Property.

In *Corn I*, this Court pointed out that the City acknowledged at oral argument that the Ordinances imposed a "ban on all building" by Corn. *Corn I* at 616 n.3.

In Proposed Findings of Fact and Conclusions of Law submitted by the City to the district court the City stated:

> *Subsequent to the expiration of the moratorium,* there was no legal impediment to any construction of any property which complied with the B-3 zoning classification. (emphasis added). (R5-200-6).

In the Status Report filed by the City in the district court the City again acknowledged that Corn was able to develop the Property for any use only once the Moratorium expired. (R7-266-8, 11).

In *Corn IV*, the City filed a Reply Brief. In its Statement of the Facts, the City described the enactment of the ordinances rezoning the Property and imposing the Moratorium. (City's Brief at 7). The City then stated:

> The effect of the legislation enacted by the City was to prevent construction on the subject property until July 4, 1978.

Indeed, on October 15, 1997, *after* this Court issued its opinion in *Corn IV*, and *after* the district court erroneously found that the Moratorium did not apply to the Property, the City filed a Reply Brief with the Supreme Court. In the City's Reply Brief the City again described the enactment of the Ordinances, including the Moratorium Ordinances, and then stated:

> *The effect of the legislation enacted by the City was to prevent construction on the subject property until July 4, 1978.* Thereafter, Corn was free to develop the Property in any manner consistent with the business zoning. (emphasis added). (Reply Brief at 5, App. 5).

The City thus unequivocally maintained, and indeed continues to maintain in its pleadings that the Moratorium applied to the Property and deprived Corn of all economically viable use of the Property from July 12, 1977, through July 4, 1978. Such statements are binding judicial admissions.

A judicial admission is a formal concession in the pleadings or a stipulation by a party or counsel which binds the party making the admission. *Keller v. United States*, 58 F.3d 1194, 1198 n. 8 (7th Cir. 1995). Judicial admissions are proof possessing the highest possible probative value. *Best Canvas Prod. & Supplies v. Ploof Truck Lines*, 713 F.2d 618, 621 (11th Cir. 1983). This Court has explained:

> Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them. *Id.*

Judicial admissions are deemed so conclusive that they act as substitutes for evidence, doing away with the need for evidence regarding the subject matter of the judicial admission. *State Farm, Mutual Automobile Ins. Co. v. Worthington*, 405 F.2d 683, 686 (8th Cir. 1968), *citing* IX Wigmore, Evidence § 2588 (3d ed. 1940).

The City's judicial admissions that the Moratorium applied to the Property and deprived Corn of all use of the Property are incontrovertible and conclusively establish these facts. *See id.; Talavera v. School Board of Palm Beach County*, 129 F.3d 1214, 1217 (11th Cir. 1997) (judicial estoppel designed to prevent parties from making a mockery of justice by inconsistent pleadings); *Sun America Corp. v. SunLife Assurance Companies Canada*, 77 F.3d 1325, 1332 (11th Cir. 1996) (party estopped from maintaining contrary position from original factual position represented to appellate court). The district court's findings to the contrary are clearly erroneous and legally improper.

(iv). Courts Have Always Held That the Moratorium Applied to the Property.

Throughout the course of these proceedings courts presiding over this cause have all found that the Moratorium applied to the Property. The City has never contested this issue or disputed any such findings.

When Corn first sued the City in 1977 in state court, Corn sought a determination that the Ordinances, including the Moratorium Ordinances were invalid and unenforceable. The City never contended in the State Court Litigation that the Moratorium Ordinance did not apply to the Property. The final judgment entered in the State

Court Litigation referred to Ordinance 552 as "an ordinance imposing a building moratorium on [Corn's] property" and was invalidated as applied to the Property. (State Court Final Judgment at 9). In affirming the State Court Final Judgment the state appellate court referred to Ordinance 552 as "imposing a building moratorium on [Corn's] property". *State Corn* at 241.

In *Corn I*, this Court stated:

> Since the subject ordinances called for a complete moratorium on Corn's development of his property any request for a variance would plainly have been futile. *Corn I* at 1516.

In *Corn II*, this Court explained that the dispute involved three ordinances, including the Moratorium Ordinance, and stated that the Moratorium Ordinance "imposed a moratorium on further development of Corn's property". *Corn II* at 586.

Significantly, after the trial of this cause, in the First Findings of Fact the district court found that the Moratorium applied to the Property and prevented all use of the Property. Specifically, with respect to Corn's loss of all use of the Property, the district court stated:

> . . . This Court agrees that *a total ban lasted for nearly a full year. . . . The record establishes that after July 4, 1978, when the building moratorium expired* by its own terms, there was no legal impediment to constructing any project that complied with the B-3 zoning classification, including the exact shopping center described in the Site Plan. (emphasis added). (First Findings of Fact at 1572.)

Based on this finding, the district court awarded Corn compensation for the loss of all use of the Property from July 12, 1977, through July 4, 1978. *Id.* at 1573.

Further, in denying Corn's Motion to Amend the First Findings of Fact, the district court confirmed its finding that during the Moratorium Corn was prevented from all development of the Property and that Corn first regained his right to develop the Property in any respect upon the expiration of the Moratorium. (R6-216-3).

While in *Corn III* this Court determined that certain of the district court's findings were clearly erroneous, this Court did not disturb the district court's finding that the Moratorium applied to the Property and prevented Corn from developing the Property in any respect.

In the Second Findings of Fact, issued after remand pursuant to *Corn III*, the district court again found that the Moratorium applied to the Property and that it was not until July 4, 1978, that Corn "regained all his sticks in the bundles of rights commonly characterized as property" and was able to develop the Property for any use. (R7-273-8, second Findings of Fact at 8.)

Only upon remand after *Corn IV*, and without affording Corn any opportunity to be heard, the district court inexplicably and erroneously changed its previous findings of fact and concluded that the Moratorium did not apply to the Property and that Corn could have developed the Property at any time after July 12, 1977, for B-3 uses. (R7-284-11). This finding of fact ignores and is inconsistent with the evidence in the record, conflicts with the City's own interpretation of the Moratorium

Ordinances and the City's judicial admissions that the Moratorium applied to the Property.

Regardless of the literal provisions of the Moratorium Ordinances, the City's expressed intent and conduct during the Moratorium and stated legal position over the years compelled the district court to have maintained its original findings of fact and conclude that the Moratorium applied to the Property, thereby depriving Corn of all economically viable use of the Property during the Moratorium.

The trial court's ruling to the contrary was clearly erroneous and must be reversed.

II. Corn Was Denied Due Process of Law Because He Was Not Given the Opportunity to be Heard or Present Evidence on Remand.

Alternatively, if the record does not clearly establish that the Moratorium applied to the Property and denied Corn all economically viable use of the Property, then this cause must be remanded with instructions for the district court to hold an evidentiary hearing on this issue. The district court's failure to afford Corn any opportunity to be heard on this issue upon remand from *Corn IV*, deprived Corn of his constitutional right to due process of law.

In remanding this cause in *Corn IV*, this Court acknowledged that Corn and the City had proceeded on the assumption that the Moratorium prohibited Corn from building anything on the Property. *Corn IV* at 3635.

This is a clear recognition that the "issue" of the applicability of the Moratorium to the Property had never theretofore been in dispute between the parties, and accordingly had never been litigated. The City has not contested whether the Moratorium applied to the Property. Indeed, to the contrary, the City has repeatedly conceded that the Moratorium applied to the Property. *See* discussion at 22-24, *supra*. Corn detrimentally and justifiably relied thereon, and did not present any evidence at trial to establish that the Moratorium applied, or was applied to the Property. There was no reason whatever to present any such evidence or argument given the City's effective stipulation that the Moratorium Ordinances applied to the Property. *See Best Canvas*, 713 F.2d at 621 (party bound by judicial admissions).

Since this factual issue has been first raised in this litigation by this Court in *Corn IV*, and there was a dispute regarding the material facts relating thereto, Corn was entitled to be heard and present evidence on this matter on remand. *See Landmark Land Company, Inc. v. OTS*, 990 F.2d 807, 812 (5th Cir. 1993). It is a denial of procedural due process to fail to afford Corn an opportunity to be heard or present evidence on an issue which has not previously been the subject of the litigation. *See Armstrong v. Monzo*, 380 U.S. 545, 552 (1965); *duPont v. Southern Nat. Bank of Houston, Tex.*, 771 F.2d 874, 880 (5th Cir. 1985) (due process entitles a litigant to be heard on each issue in litigation).

On remand the district court was presented by this Court with the task of making findings on a factual issue which had not previously been contested or at issues in the litigation. It is unfair and unconstitutional for the

district court to have made findings on this new issue without affording Corn any opportunity to be heard or to present evidence thereon.

If it is not clear from the record that the district court's findings that the Moratorium did not apply to the Property, and that Corn was not deprived of all economically viable use of the Property during the Moratorium were clearly erroneous, then this Court must remand this cause to the district court with directions to hold an evidentiary hearing on these issues.

CONCLUSION

The district court's findings of fact that at any time after July 13, 1977, Corn could develop the Property for B-3 uses, so that he was not deprived of all economically viable use of the Property during the Moratorium are clearly erroneous.

Corn requests that this Court reverse the Third Findings of Fact and Third Final Judgment and hold that the Moratorium applied, or was applied to Corn's Property, thereby depriving Corn of all economically viable use of the Property through July 4, 1978. This cause must be remanded to the district court for a determination and award of the just compensation to which Corn is entitled for the temporary taking of the Property from July 12, 1977, through July 4, 1978.

Alternatively, Corn requests this Court to remand this cause to the district court for an evidentiary hearing regarding whether the Moratorium applied, or was applied to Corn's Property, thereby depriving Corn of all

economically viable use of the Property from July 12, 1977, through July 4, 1978, and if so, setting the just compensation to which Corn is entitled.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail this ___ day of March, 1998 to Michael C. Mattson, Esq., Cooney, Haliczer, Mattson, Lance, Blackburn, Pettis & Richards, P.A., 301 E. Las Olas Blvd., Fort Lauderdale, FL 33302.

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Supreme Court, U.S.
FILED
MAY 11 1999
CLERK

No. 98-1428

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

HERMAN CORN, Trustee

Petitioner,

v.

CITY OF LAUDERDALE LAKES, et al.

Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

The Petition for Writ of Certiorari ("the Petition") must be granted because the Petition presents issues decided by the Eleventh Circuit which have not been, but should be decided by this Court. See U.S. Sup. Ct. Rule 10 (c). Through the Brief of Respondents in Opposition, (the "City's Brief"), the City [1]does not address any of Corn's explanations of why the Writ should issue. Indeed, the City does not dispute that the Petition for Writ of Certiorari (the "Petition") presents important questions of federal law decided by the Eleventh Circuit which have been previously identified, and not decided by this Court. Instead, the City simply mischaracterizes the issues presented by the Petition and unsuccessfully argues that the Eleventh Circuit correctly decided these issues. The City's Brief thus fails to overcome the compelling reasons presented by Corn for the granting of the Petition.

A. There are no Procedural Impediments to the Granting of the Petition

1. The Denial of Previous Petitions Has no Bearing on the Granting of the Petition

The City implies that this Court's previous denial of two earlier Petitions for Writ of Certiorari filed at earlier stages of these proceedings provides grounds for denial of the Petition. Clearly, this is not the case. It is well settled that the denial of certiorari imparts no implication or influence

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[1] The defined terms employed in the Petition for Writ of Certiorari shall have the same meaning in this Reply Brief.

concerning the Court's view of the merits. Hughes Tool Company v. Transworld Airlines, Inc., 409 U.S. 363, 365 (1973). Accordingly, the denial of previous Petitions for Writs of Certiorari in this case has no bearing whatsoever on the granting of the Petition.

2. **This Court May Consider Issues Decided in all Corn Appeals.**

Further, contrary to the City's contention, this Court is empowered to consider all issues which were presented to and decided by the Eleventh Circuit throughout the course of these proceedings, and is not limited to considering only the issue decided in Corn V, the most recent appeal to the Eleventh Circuit. See Mercer v. Theriot, 377 U.S. 152, 153 (1964) ("... it is settled that we may consider questions raised on the first appeal, as well as those that were before the court of appeals upon the second appeal") ; Urie v. Thompson, 337 U.S. 163, 172-73 (1949) (court's power to probe issues disposed of on appeals prior to the one under review is a necessary correlative of the rule which limited it to the examination of final judgments.); Hamilton-Brown Shoe Company v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). There is no requirement of preserving an issue decided in an earlier appeal by raising it in a later appeal as a condition to this Court granting certiorari to address such earlier decided issues. Accordingly, matters decided by the Eleventh Circuit in Corn III and Corn IV are properly presented to this Court through the Petition. See id.

The cases relied upon by this City regarding the preservation of issues are inapposite. See City's Brief at 15. In each of these cases the issue presented to the Supreme Court had not been preserved for the Supreme Court's

consideration because the issue was never raised in any appeal to the appellate court. See Tennessee v. Dunlop, 426 U.S. 312, 316 (1976) (claim not pleaded in complaint and not considered by district court or court of appeals was not before the Supreme Court on certiorari); Hasty v. United States, 282 US 694, 701-02 (1931) (Supreme Court shall not review issues which were not assigned as error on appeal to the court of appeals or passed upon there); Duignan v. United States, 274 U.S. 195, 200 (1927) (Supreme Court will not consider constitutional issues that were not presented to the court of appeals). Issues must be preserved on appeal; there is no requirement to preserve issues decided on appeal through multiple appeals.

Each of the issues presented in the Petition are properly presented to this Court for consideration.

B. The Petition Presents Important Questions of Federal Law that have not been, but should be, Settled by this Court.

The City wrongfully maintains that Corn has failed to implicate any important federal questions. The City's position is based on its inadvertent or intentional mischaracterization of the issues presented in the Petition, and is implemented through its total disregard of the arguments included in the Petition. The City makes no effort whatsoever to dispute that the Petition indeed presents important questions or federal law that have not been, but which should be, settled by this Court.

1. Questions Framed but not Decided by this Court have been Decided by the Eleventh Circuit in Corn IV.

In this regard, through the Petition, Corn explains that this case presents legal issues regarding the application of the "deprivation of all feasible use of property" rule in taking cases that this Court has identified, without answering in Lucas v. South Carolina Coastal Council, 505 U.S. 103, (1992), and Williamson County Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985). See Petition at i, 17-19. Legal issues which are framed and not decided by this Court, which are then decided by a United States court of appeals certainly qualify as important questions of federal law that have not been, but should be, settled by this Court. Since the City cannot argue to the contrary, it does not make any effort whatsoever to do so. The City does not dispute that two legal issues decided in Corn IV and presented in the Petition have been framed and left unresolved by this Court in Lucas and Williamson County, respectively. Indeed, the City's Brief does not mention Williamson County, and inaccurately cites Lucas for an unrelated legal proposition.

The City's silence on this matter is the loudest affirmation that the Petition raises important federal questions which have not been, and should be decided by this Court.

Instead of arguing whether certiorari should be granted the City simply argues that the Eleventh Circuit's decision in Corn IV is correct. First, this begs the issue of whether the Petition should be granted. See e.g., Ansonia Board of Education v. Philbrook, 479, U.S. 60, 66 (1986) (affirmance of appellate court decision after certiorari granted to consider important questions of federal law presented by appellate court decision).

Further, as a matter of law, Corn IV was correctly decided. In this regard, the City concedes that this Court has held that the deprivation of certain property interests in land have effected a taking even though economically viable uses of the land remained. See City's Brief at 12-13. The City characterizes the property interests involved in these cases as "traditional" property rights, which it distinguishes from more peripheral interests. Id. The City also acknowledges that the property rights which are protected by the 5th Amendment are created and defined by independent sources such as state law. See City's Brief at 14. The City thus acknowledges that traditional property rights in land which are confiscated by a city require payment of just compensation pursuant to the 5th Amendment, even if uses of the land remain, if the property interest taken has been created and defined by sources such as state law.

Under the City's analysis, the legal issue decided by the Eleventh Circuit is that Corn's is not entitled to just compensation for the confiscation of his state law created vested right to build the Project. This important question raised, and not decided, by this Court in both Lucas and Williamson County is presented in the Petition.

2. This Court Should Clarify when the Dolan Rough Proportionality Standard of Review Applies.

Similarly, the City does not argue that clarifying the circumstances under which the rought proportionality standard of review enunciated in Dolan v. City of Tigard, 512 U.S. 374 (1994), is not an important, unresolved question. Instead, the City only wrongfully maintains that the rough proportionality standard does not apply to Corn's claims. See

City's Brief at 14-17. The City concedes that Dolan's rough proportionality standard is applicable when a constitutionally protected property interest is confiscated by a city. See City's Brief at 16. The City simply maintains that the deprivation of a vested right to build a particular project is not such a property interest. Id. Again, the City has narrowed the issue to that identified by Corn in the Petition:

> Is a state created vested right to build a particular project a constitutionally protected property interest for which just compensation is due for its confiscation?

This important federal question should be settled by this Court through the granting of the Petition.

C. Conclusion

The City has not presented any reason whatsoever that the Petition should not be granted and the Writ issued. The Petition presents cogent and compelling reasons why the Writ should indeed issue, identifying important federal questions that have not been, and should be settled by this Court.

Corn is keenly aware of the number of cases which are presented to this Court for review and the small percentage of such cases for which review is granted. The issues presented through the Petition are important, constituting matters for which this Court's direction is sorely needed by governmental entities and landowners throughout the country.

Corn respectively requests that this Court grant the Petition of Writ of Certiorari.

DATED: May 14, 1999

Respectfully submitted,

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